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## UNITY IN CHARITY—FREEDOM IN JUSTICE *

WHILE the year is still young and the new Congress is still planning its program, we have come to the Cathedral of St. Matthew to ask God's blessing on the three branches of our government: on the President and the Executive Departments which are under his direction; on the Congress in whose hands lies the legislative power of our country; and on the Judiciary to whose wisdom is committed the interpretation of the law in the circumstances of our national life.

It is doubtful if our government ever faced a more difficult and important task than that which now confronts it. During the Civil War, it is true, the whole future of our Country was at stake. But then only our own country was involved. Now the fate of all Western Civilization depends in large measure on the decisions and actions of our government. In World War II we lived through some very dark days. Then, however, we were united by the presence of a threatening enemy and by our determination to triumph; and we were supported by allies who were joined to us in a common will to victory. Now we face an even more powerful and insidious enemy with our unity often severely tested—happily however in recent days overwhelmingly reaffirmed—and with uncertainty about allies on whom we can count.

* Sermon delivered at the Red Mass in the Cathedral of St. Matthew, Washington, D. C., February 6, 1955, by the Most Reverend Lawrence J. Shehan, D.D., Bishop of Bridgeport.

Nor is the problem simply one of external threat. Here at home are grave evils which, if permitted to grow, are bound to sap our national strength. Increasing breakdown of family stability; mounting crimes of violence and dishonesty, of wanton cruelty and gross sensuality; youthful delinquency of a magnitude frightening in its implications for the whole of our younger generation—all demand our undivided attention and united effort. Nor can we overlook the fact that in the years of our greatest prosperity the national debt has grown to a size that surpasses our powers of realization. In spite of earnest efforts to balance our budget, our mounting financial obligations constitute a problem which requires the joint concern of both parties, of all branches and departments of government, and of all our people.

If we are to meet these problems, we as a nation must have unity—unity of mind, unity of heart, unity of effort. What we need is not that monolithic unity imposed from above, which from the beginning has been characteristic of Soviet Russia and every country that has come within its orbit, as it was also the mark of Nazi Germany. Such a unity is contrary to our most sacred traditions and is repugnant to the free institutions which have been our most prized possession and the source of our greatest strength. What we need is a moral unity—a unity which springs from the will of all our people—a unity which, with a full recognition of the gravity of our problems, will lead us to join our efforts in the determination to save not only ourselves, but also the whole free world, from disaster. Such a unity can be achieved only in a national atmosphere of charity; for charity is the bond of unity—it is the first duty that springs from our common brotherhood.

The Brotherhood of Man is more than a mere phrase—it is a sacred truth springing from the Fatherhood of God and capable, with God's inspiration and grace, of transforming man's world. That, in the face of this common bond, enmity should exist anywhere in the world is indeed a tragedy; that

there should be enmity, bitterness, dissention among the citizens of this country is a double tragedy. For, in addition to the bond of our common brotherhood, the ties that should bind us together in mutual love and understanding are stronger and more urgent here than anywhere else on earth.

First, there is the bond of our common heritage. Practically all of us are descended from ancestors who came to this country to escape oppression of some sort—religious, political or economic. Here they established, or came into the enjoyment of, true freedom. Here they found unrivaled opportunity. Here they found abundance waiting to be called from the rich land by their skill and effort. Here they developed a civilization and a culture, admirable in many respects and great with potentialities—a civilization and a culture which is our very own. All these form the heritage which together we must preserve.

No part of our common heritage is more sacred in our eyes than the freedom which has always been the outstanding characteristic of our country and the dominant theme of its history. What particularly we must bear in mind is that freedom depends upon justice just as truly as the plant depends upon the soil in which it grows. Because freedom is man's distinguishing characteristic and, after life, his most basic right, justice has no higher object than the protection and preservation of man's liberty. Furthermore, freedom can exist only as a sacred right; it cannot exist as a privilege granted by government. It is no accident that under regimes that have discarded the concept of man's rights, the ideals of both justice and freedom have been banished.

So close is the dependence of freedom on justice that, wherever justice is breached, freedom is impaired; where justice is seriously and consistently impeded, freedom ceases to be. In the early history of our own country, the blot of slavery could have existed only against a background of grave injustice to the members of a whole race. The history of the labor movement shows that insofar and just so long as the

workingman failed to obtain real justice, he was deprived of true liberty. Religious freedom on the other hand has continued to flourish in this country because from the very beginning it has been protected by provisions of justice written into the Constitution through the Amendments known as the Bill of Rights. It is justice then that safeguards liberty; when justice fails freedom is imperilled.

One of our most precious rights is freedom of education, so closely allied to freedom of religion, freedom of speech and freedom of assembly. Like all freedom that of education can be hampered and even destroyed by lack of justice. While no one will deny that the state has a legitimate and even necessary concern with education, yet it seems to many of us that the exclusive support by government of a system of state education of ever-increasing costliness can in the long run seriously hamper and ultimately destroy real freedom of education. The wealthy no doubt will continue to be able to support, in addition to the state program, the kind of education they desire for their children. But already in some places freedom of education seems to be threatened for the man of small or moderate means, who feels that he has a duty to provide for his children the kind of education which includes religious instruction and training as an integral part of the school curriculum. Justice would seem to require recognition of the public service involved in all properly qualified educational programs carried on by private groups and voluntary associations. At a time when increasing recognition is being given to the importance of restoring religious and moral influence to education and to the whole of life, those should not be misunderstood who ask for consideration of what justice requires for the preservation of freedom as a part of their sacred heritage.

Even more than by a consciousness of our common heritage the citizens of this country should be united by a sense of their mutual dependence. For all the good things we possess come not from the wisdom and power of some benevolent

despot who has set us to work and stands ready to turn benevolence into tyranny at the first sign of our lagging. Under God it has come from the joint thinking, and planning, and working of the millions who have found in this land their true home. It is perfectly clear that our blessings will remain secure in our hands only so long as we continue to think and plan and labor together.

But that love which is the bond of our unity involves something more than a consciousness of our common brotherhood, an appreciation of our joint heritage and a sense of our mutual dependence. It involves also love of the country of which each of us forms an integral part. America is something more than the sum-total of its land and its citizens. It is a nation; it is a state; it is a body politic in which each of us has a voice, and each of us exercises a vital function. No nation on earth can boast an origin more noble and inspiring. None of the great states of the world was conceived and brought into being with such deliberation, such wisdom, such care. No body politic has more consistently pursued as the object of its existence the common good of its people.

In the course of our history the Constitution has become the symbol of what is best in this country and the foundation of that juridical system which is the framework of our national life. The strength of that Constitution comes not merely from the human wisdom with which a system of government truly representative of the people was devised. It comes also and especially from the clear concepts embodied within it, first of the dependence of civil law on moral law, and secondly, of the true nature of the common good as the sole object of government.

Our own times have seen a tendency world-wide in scope to ignore or to deny the connection of moral and civil law, and to substitute the good of the state, i.e., the advantage of the government, for the common good. In the broadest and true sense the good of the government must coincide with the common good, since government has no other reason for exist-

ence. But often there is a vast difference between the common good and the concept of good entertained by governing people. Too often men who come into power show a tendency to make the common good secondary to the good of themselves and their party. That legislators, administrators and jurists in this country have some times been affected by this trend is no doubt true. It is to be hoped that by placing increasing emphasis on moral law as the foundation of all law, and on the concept of the common good as the sole object of government, our country will preserve its noblest traditions, which are the basis of our patriotic love.

Perhaps that which has done most to endanger the sense of brotherhood and the feeling of grateful love of the country which has brought us so many blessings has been man's worship of material progress—particularly his worship of the science which was so largely responsible for that progress. In a little book published not long after the end of World War II, Charles Lindbergh, who perhaps more than any man has symbolized the generation which came to manhood in the years following World War I, and to the full stature of maturity during World War II, tells us how he and so many of his generation worshipped at the altar of science. "I grew up" he says, "as a disciple of science. I know its fascination; I have felt the God-like power man derives from his machines. . . . To me in youth science was more important than man or God."

But in the wisdom that came with the experiences of World War II, the illusions of youth faded away. At its end, seeing the horrible destruction science had brought about, and contemplating the even more horrible disaster of a possible World War III, he came to the conclusion that: "if his civilization is to continue, modern man must direct the material power of his science by the spiritual truths of God." And he ends with these words: "There is no material solution, no practical formula which alone can save us. Man has never been able to find his salvation in the exact terms of politics, economics and

logic." From Plato's Republic down to the latest blueprint for a better order of things, "his planned Utopia's have not proved the answer, for the answer is at a deeper level. Our salvation and our *only* salvation lies in controlling the arm of western science by the mind of western philosophy, guided by the eternal truths of God."

To God then modern man must turn for his salvation. That salvation will come not merely from a knowledge of the truths of God, but from the love of God which is the essence of true religion. From God comes the Brotherhood of Man, and from God come all the blessings this country has brought to us. Only through love of God can man overcome that selfishness which seeks to destroy both love of fellow-men and love of country.

In our hour of need we turn to Christ, the God-Man, who in His unity with the Father and the Holy Spirit is the perfect exemplar of that unity which must exist among men. In His hour of peril He prayed: "that all may be one as thou Father in Me and I in thee; that they may be one in Us." In that prayer we, the people of this country, are included.

Dear Saviour of Mankind, in our hour of trial and temptation give to thy children of this great country true unity of mind and heart. Grant that they may put aside all hatred, rancor and division. Give to them the wisdom to see clearly the tasks that must be done. Grant that, being truly united, they may put forth that strength which may save both themselves and all the world from the forces of slavery and of destruction. Amen.

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# THE SCRIPTURAL BACKGROUND OF CANON 1120

"LEGITIMUM inter non baptizatos matrimonium, licet consummatum, solvitur in favorem fidei ex privilegio Paulino." [1]

The basis in Sacred Scripture for this prescription of the Code is found in I Cor. 7, 12-16: "For to the rest I say, not the Lord: If any brother has an unbelieving wife and she consents to live with him, let him not put her away. And if any woman has an unbelieving husband and he consents to live with her, let her not put away her husband. For the unbelieving husband is sanctified by the believing wife, and the unbelieving wife is sanctified by the believing husband; otherwise your children would be unclean, but, as it is, they are holy. But if the unbeliever departs, let him depart. For a brother or sister is not under bondage in such cases, but God has called us to peace. For how dost thou know, O wife, whether thou wilt save thy husband? Or how dost thou know, O husband, that thou wilt save thy wife." [2]

The Greek text is here quite certain, and the English translation reproduces the meaning faithfully.[3]

It should be noted, first of all, that St. Paul immediately before the passage just cited states as a general rule that a husband and a wife are not to separate the one from the other; moreover, if they should separate, they are not to pass to another marriage. This prescription comes from God.[4]

In Greek or Roman Law there was no such institution as a separation from bed and board. Hence, if one spouse sepa-

[1] C.J.C. 1120, § 1.

[2] Cited according to the Confraternity Edition of the New Testament, as are all other citations from the Epistle.

[3] Cfr. A. Merk, S.J., *Novum Testamentum Graece et Latine,* 5 ed., Pontifical Biblical Institute, Rome, 1944, p. 563, s.

[4] I Cor. 7, 10, s.

rated from or dismissed the other, there was immediately effected a divorce.[5]

The Apostle proceeds to give in the cited passage an exception to the general norm which he has already stated; this exception concerns the marriage between a Christian and an unbeliever. At the time of St. Paul an unbeliever was one who was not baptized.[6]

The first question that arises is this: when was the marriage in question contracted. The majority of exegetes—if not all[7]—hold that the type of marriage considered by the Apostle is one which was contracted before the Baptism of the Christian party. Such seems quite obvious from the context of the letter itself. Furthermore, inasmuch as Jews were forbidden contacts with Gentiles,[8] it would have been quite natural for some Christians to be led to believe that the most intimate relationship possible with another person, marriage, would be prohibited between a Christian and a pagan, and that consequently any existing matrimonial bond of two non-baptized persons would be or should be dissolved at the Baptism of one of the parties. Such a climate of opinion would have been especially likely at Corinth, for one of the reasons for St. Paul's

[5] Cfr. e.g., V. Jacono, *Le Epistole di S. Paolo . . .*, Marietti, Turin, 1952, p. 313; C. Spicq, O.P., "Epitres aux Corinthiens" in Pirot-Clamer, *La Sainte Bible,* Letouzey & Ané, Paris, 1947, vol. XI, part II, p. 215, ss. For the Roman concept of marriage and divorce, cfr. P. Bonfante, *Istituzioni di Diritto Romano,* 10 ed., Giappichelli, Turin, 1951, pp. 180-194; although Bonfante is concerned primarily with the law of the Justinian codification, the earlier notions are given. It is well to note that Corinth at the time of St. Paul was an Italic *colonia* and hence subject to Roman law; cfr. Suetonius, *Caesar,* XLI, s.; Spicq, *op. cit.,* p. 164, s.; Jacono, *op. cit.,* p. 255; C. Callan, O.P., *The Epistles of St. Paul,* Wagner, New York, 1951, vol. I, p. 246. Separation was also unknown to the Jews; cfr. e.g., A. Vaccari, S.J., in "De Matrimonio et Divortio apud Matthaeum," *Biblica* 36 (1955), p. 150.

[6] Cfr. R. Cornely, S.J., *Commentarius in S. Pauli Epistolas,* Lethielleux, Paris, 1890, vol. II, p. 176; Jacono, *op. cit.,* p. 313, etc.

[7] F. Prat, S.J., *Theology of St. Paul,* Burns, Oates, London, 1926, vol. I, p. 113 speaks in general terms: "The mixed-marriage tie is weaker."

[8] Cfr. J. Bonsirven, S.J., *Il Giudaismo Palestinese al Tempo di Gesù Cristo,* Marietti, Turin, 1950, p. 106, s.

writing the Epistle was his hope of combatting Judaizing tendencies which existed in the Corinthian Church.[9]

The Apostle states that the Christian spouse should continue to live with the non-baptized partner if the latter consents to live with the baptized party.

One should note that some exegetes, and not a small number of them, hold that the Apostle only counselled the non-breaking of life in common.[10] Others[11] hold that St. Paul gave a command. The words " Let him not put her aside ", which in the Greek contain a third person of the imperative, seem surely to indicate a command.

The reason which the sacred author adduces for the continuation of life in common can be let aside, for it does not enter into the scope of this article. However, the fact that there is mention in the reason of children shows that the Apostle is considering a consummated marriage.

In v. 15 the Apostle states, " If the unbeliever departs, let him depart." As we have seen this means that the bond of matrimony is broken for " to separate " or " to go away " with reference to a spouse as such meant in Greek a breaking of the matrimonial bond. The same can be said of " to put aside " or " to dismiss ".[12] In v. 11 the presence of the qualifying phrase shows that in the case there considered the bond was not broken. However, in v. 15 there is not found a qualifying phrase, and therefore the Apostle definitely permits the dissolution of a natural bond of marriage.

One requisite for such dissolution is the Baptism of one party and the non-baptism of the other. The second requisite is the departure of the unbaptized partner. Exegetes are in accord in stating that such separation means either a real separation in which the unbaptized party departs with a posi-

[9] Cfr. Callan, *op. cit.*, p. 250, s.

[10] E.g., Cornely, *op. cit.*, p. 181; Spicq, *op. cit.*, p. 217; Callan, *op. cit.*, p. 324.

[11] Jacono, *op. cit.*, p. 313; cfr. Cornely, *op. cit.*, p. 180, s., for a long list of ancient commentators who shared this view, and Spicq, *op. cit.*, p. 217: " Toutefois, S. Jerome . . . et la plupart des modernes y voient un precepte."

[12] Note 5 above.

tive refusal of cohabitation or a refusal to cohabit without offering contumely to God, that is when the unbaptized party consents to cohabit but refuses to promise not to pervert the faith or morals of the baptized party or positively attempts to pervert the faith or morals of the baptized party.[13]

Inasmuch as the baptized party has the duty of educating his or her children properly, the refusal to permit such education or the attempted thwarting of such education would be the offering of contumely to God.

One question which might rise would be the one in which the unbaptized party was separated from the Christian party and in which the unbaptized party would be willing to cohabit peacefully with the Christian party if the conditions preventing such cohabitation were removed, but in which the removal of the obstacles to cohabitation does not depend upon the will of either party. From the Roman concept of separation,[14] which seems to have been that of the Apostle and which in general he prohibits, it would seem that the Apostle would allow the dissolution of the marriage bond in such a case. Thus the Constitution *Populis* would have been issued merely as explanatory of the privilege allowed by St. Paul.[15]

The reason given by the Apostle for the privilege is that the Christian party is not "enslaved" in such case. Thus the Apostle would seem to allow the use of the privilege, granted a separation in the sense given above, even when no danger would exist to the faith or morals of the baptized party who could not remarry.

It is to be remembered that St. Paul was directly concerned with stating that the matrimonial union existing between two persons one of whom was later baptized could continue. Canon 1124 states that the privilege can be used even if after

[13] Cfr. Jacono, *op. cit.*, p. 314; etc.

[14] Cfr. Bonfante, *op. cit.*, p. 189.

[15] Contra e.g., Jacono, *op. cit.*, p. 315, and F. Cappello, S.J., *De Matrimonio*, 5 ed., Marietti, Turin, 1947, p. 779, s.

cohabiting peacefully for a time the non-baptized party departs or prohibits peaceful cohabitation. This seems to be already an extension of the privilege contained in the Epistle, but an extension which is completely in accordance with the spirit of the Pauline concession for " a brother or sister is not under bondage in such cases, but God has called us to peace." [16]

By *a pari* reasoning it will be seen that the privilege proclaimed by the Apostle can be applied to any marriage of a baptized and a nonbaptized person when the requisites are fulfilled. This statement in no way contradicts the provisions of the Code [17] for the Church to which has been granted the power of the keys has the right to determine when the application of the privilege should be allowed.

The text of the Epistle does not seem to indicate the time when the previously existing matrimonial bond is dissolved when use is made of the privilege. Inasmuch as the concession is made for the benefit of the Christian party, it seems only just to conclude that according to the mind of the Apostle the dissolution took place only when the Christian party made definitive use of it, that is when the Christian party passed to a new marriage. Inasmuch as the Church has the power of the keys it certainly could determine the actual time of such dissolution.[18]

The final question which must be considered is this: is the person who makes use of the privilege bound according to the Apostle's teaching to contract the new marriage with a baptized person?

St. Paul does not give any rule concerning this in the immediate section. Later, when speaking of the liceity of second marriages for widows, he states, " Let her marry whom she pleases, only let it be in the Lord." [19] Some exegetes hold

[16] I Cor. 7, 15.

[17] Canon 1120, § 2.

[18] As it does in Canon 1126.

[19] I Cor. 7, 40.

that these words mean that the widow must marry a Christian; [20] others hold that the Apostle means that such a marriage should be entered into according to the dictates of the moral law; indeed, some go so far as to state that a marriage with a Christian is not absolutely necessary.[21]

As is obvious from the practice of the Church a marriage between a Christian and an unbaptized person is not absolutely prohibited. Hence, if St. Paul is forbidding such a marriage, the prohibition is only a local one; [22] moreover, the phrase "in the Lord" would seem not to refer to a Christian second party to a marriage, for one would expect that if such were the meaning we would find in the text "only to one in the Lord". Consequently with reference to widows the Apostle does not, it seems, give a norm; hence we have no norm by analogy for the nature of the new spouse of the person using the Pauline privilege in the Epistle itself. However, it would certainly be more consonant with the Apostle's teaching to state that a marriage which did not run the risk of sometime suffering dissolution because of the departure of the other party would be at least preferred.

This article has attempted to show that any legitimate non-sacramental marriage can be dissolved in virtue of the teaching contained in I Cor. 7, 12-16 when the necessary conditions prevail. In no way is it intended to show that the Church cannot determine the application of the privilege in determined circumstances.

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[20] E.g., Cornely, *op. cit.*, p. 217; Spicq, *op. cit.*, p. 224; Callan, *op. cit.*, p. 334; E. Donze, S.M., in *A Commentary on the New Testament*, Sadlier, New York, 1942, p. 463; W. Rees in *A Catholic Commentary on Sacred Scripture*, Nelson, Edinburgh, 1953, p. 1090. Even non-Catholics hold this view; e.g., J. von Allmen in *Vocabulaire Biblique*, Delachaux & Niestle, Neuchatel, 1954, p. 168.

[21] Jacono, *op. cit.*, p. 321; cfr. Cornely, *op. cit.*, p. 216, s., for a long list of ancient commentators who hold this opinion.

[22] For an example of a local and temporary prohibition in the New Testament, cfr. Acts, 15.

# THE PROBLEM OF SUNDAY OBSERVANCE ON THE MISSIONS

## I. Sunday Mass

1. *Status Quaestionis.*

THE observance of Sunday on the missions is one of those practical problems which we meet with daily, for which we all have a solution, but one with which nobody is ever really satisfied. In our attempts to plant the Church in pagan lands we have to keep in mind how immature our converts still are with regard to the living of their faith. We cannot expect them to be able by means of charismatic gifts to switch over suddenly from a pagan mentality to a Christian outlook. And this reorientation cannot even be achieved by a thorough instruction and the reception of the sacraments. Their ways of life remain unaltered and the heathen surroundings and traditions continue to exercise their influence. So it may happen that despite full knowledge of the first commandment they still hold on to traditional superstitions and due to the influence of the latter, do things or follow customs that would not stand a theological analysis.

Similarly they can give a perfect answer to the catechism question regarding what the Church prescribes concerning keeping the Sunday holy. They know that the Church obliges them to hear Mass on Sundays and to refrain from certain kinds of work. But problems arise when it comes to the practical application of these commandments. Does the obligation to hear Mass bind everybody under all circumstances, in fair weather and in foul, living next door to the church or far away? How far away? How often? And what must they do the whole long day when they have heard Mass, or when the distance excuses them from coming to church? Industrialisation on the missions is not as far advanced as here in Europe and their usual occupations consist mostly of

work on the land or other manual work. But that is forbidden on Sundays. They have no intellectual aspirations. So reading and study do not exist for them. You cannot tell them to keep at their prayers all day long, or to go for a walk in the tropical heat. What then? *"Multam malitiam docuit otiositas"*, says Holy Scripture.[1] And yet we read in Moral Theology books such as Merkelbach:[2] *"Non excusat otium vitandum, aut vehementis tristitiae pondus, nec periculum peccati, nisi aliter vitari non possit, quod vix accidit"*. I prefer St. Augustine, who was more realistic in his outlook when he wrote: *"Melius faceret Judaeus in agro suo aliquid utile quam in theatro seditiosus existeret. Et melius feminae eorum die sabbati lanam facerent quam tota die neomeniis suis impudicis saltarent"*.[3] And St. Thomas was in full agreement with this and therefore taught that committing sin is a worse breaking of the Sunday than doing manual work.[4] Hence it cannot be the Church's intention to let the natives twiddle their thumbs the whole Sunday. What then may they, and may they not do? That is precisely the problem demanding a clearer elucidation and solution.

I propose therefore to try to throw more light on this commandment of the Sunday observance and then, even if we cannot directly propose a generally acceptable solution, we shall at least be able to grasp the background and the spirit of the law, and thus perhaps be helped to come to a more ideal formulation.

2. *Practices in the Missions.*

a) *In China.* The first Jesuit missionaries in China published a Chinese catechism in 1584, in which the ten commandments were included, also the third commandment about keeping the Sunday holy, but they did not bind their

[1] Eccl. C. 33, v. 29.

[2] *Summa Theol. Mor.*, Vol. II, n. 689, 5°.

[3] *De decem chordis*, Sermo 9, c. 3; *P.L.*, t. 35, c. 37.

[4] S. Th., 2a 2ae, Q. 122, art. 4, ad 3um.

Christians to this, "since they were still too weak". The visitator in 1590, Antonio Rubino, was of opinion that the missionaries should not proclaim the positive ecclesiastical laws concerning Mass attendance on Sundays and concerning fasting and abstinence in such a way as to make formal sinners of material sinners. Exhort and instruct them about these commandments, certainly, but do not oblige the Christians to obey them. When the Franciscans came to China in 1630, they reproached the Jesuits for still regarding their Christians as feeble seedlings after fifty years of evangelisation. So the Mendicants immediately set to work to oblige their Christians to attend Mass on Sundays and days of obligation and to abstain from heavy work. The Dominicans, under the leadership of Father Morales, also tried to come to an agreement with the Jesuits about the rites and the observance of the positive ecclesiastical laws. Finally all appealed to Rome and on March 23, 1656 Rome replied: "The positive ecclesiastical laws must be preached, but the *causae excusantes* may be taught as well".[5] This assured uniformity of preaching, and Christianity flourished, so that in 1665 Father Bonaventura Ibañez O.F.M., was able to write that three thousand Christians in Shantung were zealously attending Sunday Mass and observing the days of fasting and abstinence. But the Jesuits were not entirely in agreement with the new discipline and let their Christians get on with their ordinary work after hearing Sunday Mass.

In 1664 Mgr. Pallu, one of the well known founders of the *Missions Etrangères de Paris,* asked permission of Propaganda to allow the poorer Christians to work on Sundays. Propaganda, in its answer of 1665, refused this. On July 13, 1769 in an Instruction to some Chinese bishops,[6] the Holy Office gave them the power to dispense the poor among their faithful so as to allow them to do manual work on the afternoons of Sundays and holy days. In 1841 Pope Gregory XVI

[5] *Coll.* I, n. 126.

[6] *Coll.* n. 473.

gave the same power to all bishops belonging to the Paris missionaries, which power was extended in 1851 to all Chinese bishops. The same year there appeared in Hong Kong a book by Mgr. Rizzolati O.F.M., "*Praxis Missionariorum*", which gave detailed instructions regarding the Sunday observance. In it were enumerated the various forbidden and permissible activities. After Mass Catholics were to be allowed to:— irrigate their fields, plant, sow, harvest, take part in public activities when forced by the mandarins, trade, buy, go to market, etc. It was forbidden to carry burdens, load and unload ships, spin, weave, do carpentry, bricklaying, smithy work.

In 1883 the Holy Office refused to grant the whole of China a general dispensation regarding servile work after Sunday Mass. It is true, there were still too many holy days of obligation, but these were finally reduced to the seven great holy days for all China at the Chinese National Council in 1924, with obligation of attending Mass and abstaining from servile work, as on all Sundays. And so the general law of Sunday-observance was safeguarded in China after a struggle of four centuries.

b) *In Africa.* The African Missions are of relatively recent date, and when they started Propaganda had already outlined a definite plan for mission countries in general regarding the observance of Sundays and holy days of obligation. So one does not find the same struggle here that we have just described of China. In Africa it is mainly a question of adapting the universal law of hearing Mass and abstaining from servile work. In some missions the area is divided into districts, and definite Sundays are indicated on which the Christians in that district must come to Mass. On the other Sundays, when they are not obliged to come to the mission station, they must go to the nearest catechumenate where the catechist leads a meeting for prayers. But this attendance at a prayer meeting cannot be imposed under pain of sin. In other mission stations a radius of three or four miles is laid

down, and all Christians living within that radius must come to the mission every Sunday; the others come when they please. Other missionaries again prefer to go personally to the out-stations, and to say Sunday Mass there for their Christians, the result often being that the Christians lose contact with the station.

As for the problem of servile work: in the "reserve", i.e. away from the towns, all manual work is usually forbidden, while in the towns and on the farms, those activities are forbidden which are practised during the week to earn a living. Markets are still fairly common on Sundays, especially in those parts where the majority of the population is still pagan. The inevitable result is that loads are carried to and from the markets on Sundays. Although carrying of loads certainly falls under the term 'servile work', one can bring forward by way of excuse that the Code allows markets on Sundays where such is the custom; but we shall return to this later. In order to treat the question of the Sunday observance logically, I propose first to give a brief historical sketch of its origin, followed by an analysis of the law as we have it now, with its twofold obligation of hearing Mass and abstaining from servile work, each of which will then both be developed separately, keeping in mind the mission problems which result.

3. *Observance of the Sunday.*

All Christians have from the very beginning accepted and regarded the Sunday as the day which they must devote in a special way to God. The natural law demands indeed that man should set apart a special time to exercise his duties as a creature to God, his Creator, not only as a private individual but also in public as a social being, in a special way therefore. The time and manner of fulfilling this duty depend on a positive law promulgated here on earth by God or His representative. In the Old Testament the Jews were bound by the law given to them on Mount Sinai to consecrate the seventh day of the week to God in a special manner in imitation of

God who also rested on the seventh day after the six days of creation. With the coming of the New Covenant the old ceremonial law ceased to bind and a new ecclesiastical law came into force proclaiming that henceforward the first day of the week should be set apart for divine worship instead of the seventh. "*Observantia diei dominicae in nova lege succedit observantiae sabbati, non ex vi praecepti legis* [*veteris*] *sed ex constitutione Ecclesiae et consuetudine populi Christiani*".[7] The Apostles introduced this custom as we read in the *Apoc.* I, 10: "Fui in Spiritu in die dominica", and in the *Acts* XX, 7, we read: "*Una autem sabbati, cum venissemus ad frangendum panem*", i.e. *die dominica;* and St. Augustine said: "*Una sabbati appellatur dies, qui nunc dominicus vocatur*". Observance of the Sunday was general in the second century, for St. Ignatius[8] says, "*Non amplius sabbatizemus more judaico . . . at post sabbatum omnis Christi amator dominicum celebret diem*". So it is beyond doubt that already in the second century the observance of the Sunday instead of the Sabbath, i.e. of Saturday was transferred to the first day of the week. The '*modus quo*' of that observance depends of course on positive ecclesiastical law and this we find crystallized for our own times in the Code, Can. 1248, which prescribes: "*Festis de praecepto diebus Missa audienda est; et abstinendum ab operibus servilibus, actibus forensibus, itemque, nisi aliud ferant legitimae consuetudines aut peculiaria indulta, publico mercatu, nundinis, aliisque publicis emptionibus et venditionibus*".

4. *The Obligation to hear Mass.*

Right from the first ages of Christianity, attendance at Sunday Mass seems to have been accepted as a general obligation. In the *Didascalia,* C. 14, we read: "*Die autem dominica congregati frangite panem et gratias agite, postquam confessi eritis peccata vestra, ut mundum sit sacrificium vestrum*".

[7] S. Th., 2a 2ae, Q. 122, art. 4, ad 4um.

[8] In *Ep. ad Magnes.;* cf. Migne, *Patr. Gr.* V, 768.

This duty is mentioned even more clearly and positively in *Conc. Illiberitanum* (306) and *Conc. Sardicense* (343)[9] and from a decision of the *Conc. Agathense* (506) "*Missas die dominico saecularibus totas audire speciali ordine praecipimus, ita ut ante benedictionem sacerdotis egredi populus non praesumat*". Since that time the commandment of hearing Sunday Mass has lived on unchanged in the Church and although She has the power to change it, She has never done so. As regards the prohibition of servile work on Sundays, I propose to treat of that in the second part.

Apart from these two commandments contained in Can. 1248, the Church imposes no other obligation under pain of sin, for the observance of the Sunday. But the impossibility of obeying one of the obligations does not thereby free the Catholic from observing the other. The two are quite independent of one another. If it is physically or morally impossible to observe one of the two obligations of the law, the law ceases to oblige in that point, and we call that "*excusatio legis*". But it may also be that the circumstances or reasons are not such as to make the law cease to oblige, but such as to make it desirable that the law should not oblige. For such individual cases the Church empowers bishops and pastors not to urge the application of the law. This we call "*dispensatio legis*". Universal law gives this power in Can. 1245, par. 1 in the following words: "*Locorum ordinarii et parochi a lege communi de observantia festorum dispensare possunt in casibus singularibus iusta de causa sibi subjectos singulos fideles singulasve familias . . .*". Here no distinction is made between the two obligations and hence this canon empowers one to dispense from both, but only in individual cases and '*per modum actus*', not in general.

Propaganda has given a special mandate for the missions in Fac. 48 of the Apostolic Faculties, by virtue of which the Ordinary and subdelegated priests can dispense '*per modum habitus*' not only individuals but even whole groups only

[9] Cf. Vermeersch, *Theol. Mor.*, III, p. 826; Prümmer, *Theol. Mor.*, II, p. 388.

from the prohibition of servile work on Sundays, but the obligation of hearing Mass remains, since no dispensation can be given from this duty by virtue of Fac. 48. If the people, who are in this way dispensed from one part of the Sunday law, are also excused from the other part of the law by reason of circumstances which make it impossible for them to attend Sunday Mass, they are bound '*sub gravi*' to say those prayers imposed by the priest in lieu of hearing Mass.[10] It is useful to draw attention here to the difference between this case and the one where the faithful without using a dispensation to perform servile work on Sunday are excused by normal circumstances from hearing Mass. They must of course keep the Sunday holy by substituting prayers for the Mass, but they are not bound to this substitution '*sub gravi*' according to a pronouncement of Propaganda of January 4th, 1798.[11]

5. *Causa Excusans: Nimia distantia.*

I do not intend to go into all the *causae excusantes* which can excuse one from the obligation of attending Sunday Mass. These are to be found in manuals of Moral Theology. But there is one *causa excusans* which I wish to discuss in connection with practices in the missions. *Nimia distantia* is classed as one of the *causae excusantes,* which according to St. Alphonsus—supported by most of the authors—can constitute such an obstacle that it becomes *valde difficile* i.e. *moraliter impossibile* to observe the Sunday commandment to come to church. The distance which constitutes a *magnum incommodum* is reckoned by the authors as an hour's journey in each direction. This is undoubtedly true in Europe, where we are pampered, but every missionary will agree with me that an hour's walk does not constitute a *magnum incommodum* for a healthy native in the bush. A negro in our African missions thinks nothing of going three or four hours to visit a friend or to join a beer party. I have often noticed

[10] S.C.P.F., 12th March, 1875; cf. *Coll.* n. 1437.

[11] Cf. *Coll.* n. 642.

that people who did not come to church because they lived beyond the three mile limit, passed the church and went on a couple of hours further to pay such a visit. So the question arises: must we take the '*magnum incommodum*' of three or more miles as an absolute or a relative norm? Prümmer [12] says very wisely: "*Iter unius horae non est grave incommodum pro plerisque quando tempus est serenum et via plana*"; while Noldin [13] who accepts an hour's walk each way as a valid excuse, quotes Busenbaum who says: "*In hac re habendum esse rationem consuetudinis loci*", and Noldin adds that in the Tyrol for example no one would consider himself excused by living an hour's or an hour and a quarter's distance from the church. But if we are advised to take the '*consuetudo loci*' in the Tyrol as the norm for the '*excusatio*' from the law, then we shall also have to consult the '*consuetudo loci*' in the missions, instead of just '*absolute*' applying to all missions the norm of one hour's journey each way. And where a healthy native will only consider a walk considerably longer than one hour a '*magnum incommodum*', we must to my mind also apply this norm with regard to the Sunday obligation. The difference between the ruling followed by different mission stations in this matter has had fatal and confusing influences on the faithful. It is up to the Ordinaries, however, to determine the relative norm to be followed in their districts and the missionaries should abide by this.

We know, of course, that those who are excused from coming to church on account of distance or any other valid reason, are still bound to hear Mass several times a year. And on the days they do not come, they should keep the Sunday holy in some way by meeting for prayers. The observance of the Sunday is a thermometer for measuring the Catholicity of a people. Where the Sunday atmosphere is lacking, the Sunday observance also grows slack, the more so since the problem of servile work is so unsettled in many places owing to the lack

[12] *Theol. Mor.*, II, 1941, n. 486.

[13] *Theol. Mor.*, II, 1941, n. 263.

of a clear definition and the absence of a formed '*consuetudo christiana*' in the matter.

## II. Servile Work

From Can. 1248 we know that the Code recognizes '*consuetudines*' as one of the determining factors in defining which activities are lawful on a Sunday. And rightly so, for the Sunday law as we know it to-day, has grown out of the '*consuetudo populi christiana*' and this '*consuetudo*' is still officially regarded as of the highest importance. We as missionaries have to pay special attention to this, since in the missions Christian habits have still to be formed and the missionaries are instrumental in directing these into the right channels. Hence it is essential for missionaries to have a clear insight into this matter in order to be able to form healthy justifiable '*consuetudines*'. For this we need a good understanding of the historical and moral-theological development of the law. For then only will it be possible to reconcile the apparent contradiction between the static element called 'law' and the dynamic element called 'custom', so as to bring about a harmonious solution. This alone can lead to a strict, healthy discipline in the new Christian communities on the missions.

### 6. *Origin and First Development of the Prohibition to Work on Sundays.*

An examination of the New Testament and the Apostolic Fathers regarding the prohibition to work on Sundays produces only a negative result. It is true that we read here of a Sunday liturgy,[14] eucharistic in character, but there is no reference or allusion to any sort of rest or abstention from work. One thing, however, is perfectly clear from the writings of St. Paul[15] and from the earliest Christian witnesses[16] that the Sunday was not regarded as a sort of Christian sabbath. So

[14] *Acts*, XX, 7; *Apoc.* I, 10.

[15] *Gal.* III, 13; IV, 10-11; *Colos.* II, 16-17.

[16] Cf. *Opera Patrum Apostolicorum*, Tübingen, 1901, I, p. 237.

for example St. Ignatius in the second century writes:[17] "*Non amplius sabbatizemus judaico more . . . at post sabbatum omnis Christi amator dominicum celebret diem*". The Sunday and sabbath resembled one another in so far as both were the weekly recurring days of worship for different groups of people. For the first Christians, Sunday was essentially a eucharistic feast with intense spiritual activity—not rest—as its dominating element. It was unavoidable that this spiritual concentration should lead eventually to a tradition or custom of abstaining from distracting and worldly occupations on Sundays. So we read in Tertullian that already towards the end of the second century they had developed so far that, "*die dominico . . . ab omni anxietatis habitu et officio cavere . . . differentes etiam negotia ne quem diabolo locum demus*".[18] It is worth noticing that they made no distinction between servile and liberal works. For the third century we find a text in the *Didascalia*[19] which advises abstention from activities likely to hinder attendance at Divine Worship: "But for the rest, all ye faithful, persevere in your work when not in church".

Right up to the end of the third century, there is not the least indication of a law imposing abstention from work on Sundays except where this work would form an obstacle to a suitable celebration of the Sacred Mysteries. But then comes a sudden change. In a Paschal letter of 312, St. Peter of Alexandria strictly forbids work on Sundays, doubtless under the influence of the judaizing element in Alexandria, where the community largely consisted of convert Jews. He says in this letter: "You bishops and leaders of the people, see to it that nobody stays away from the gatherings of the community except the prisoners and the sick. And I order you not

[17] *Ep. ad Magnes.*; cf. Migne, *Patr. Gr.*, V, 768, ssq.

[18] *De Oratione*, n. 23; *P.L.*, t. I, c. 1191.

[19] Translated from the Syriac by Margaret D. Gibson, in *Horae Semiticae*, London, 1903, II, p. 67-68.

to do any work on the holy day of Sunday but be zealous in reading Holy Scripture and giving bread to the poor".[20]

On March 7, 321 the Emperor Constantine issued a civil law forbidding all legal proceedings and activities in the towns on Sunday. But in the country the "*pagani*" i.e. the inhabitants of the '*pagi*', might continue to exercise their normal occupations which consisted of course in manual work, namely '*opus rurale*', which term was taken over by the Council of Orleans in 538 as synonymous with '*opus servile*'. Constantine made that exception for the '*pagani*' since they were not yet converted and therefore did not need to come to the religious services. This civil decree of Constantine and the letter of St. Peter of Alexandria were responsible for a judaizing tendency which now began to grow among some groups of Christians to apply the sabbath discipline to the Christian Sunday. The Church's reaction soon followed. The Council of Laodicea in 370 published the first conciliary decree concerning the observance of the Sunday in which the Christians were recommended to keep to the traditional observance of the Sunday and on no account to apply the Jewish sabbath observances to the Sunday. "And regarding Sunday the faithful are exhorted out of reverence for the holy character of the day to take such rest as circumstances allow and in the Christian spirit.—"Quod si inventi fuerint Judaizantes, sint anathema apud Christum".[21] This decree seems at least for some time to have stemmed the pharisaical judaizing tendency. For the contemporary writings of the Fathers and the Councils all presume a great degree of freedom. St. Jerome, for instance, mentions nuns in Jerusalem who, he says, "only go to church on Sundays, and take up again their work most zealously after their return from the church, making clothes for themselves and for others.[22] The other Fathers of the period were equally broad-minded in their

[20] *Eph. Theol. Lov.*, Vol. 12, p. 299.

[21] Can. 29; Mansi, *Concilia*, t. II, c. 570.

[22] Ep. 108, n. 19; *P.L.*, t. XXII, c. 896.

outlook as we can read in St. John Chrysostom and St. Augustine. According to them the Sunday rest was of obligation only in so far as was demanded and necessary to facilitate attendance at church. Apart from this there was no law forbidding them to work. Only when writers and preachers began to link up the obligation of the Sunday rest with Old Testament prescriptions regarding the Sabbath, and to introduce the term and idea of servile work, was that rigorism initiated which gradually began to be crystallized as a law from church to church and from Council to Council. In this way it was developed and restricted on parallel lines with the Sabbath, out of which the scholastics had the greatest difficulty in saving the original concept of the Sunday observance. For a better understanding of this sabbatarian misconception, I propose to go further into this question so as to be better able to refute the illusion of a parallel with the Sabbath.

7. *The Sabbath and the Decalogue.*

We have already heard how Tertullian at the end of the second century exhorted the Christians to abstain from such works on Sundays as would hinder the Eucharistic celebrations. But there was no question that the Christians were doing this out of obedience to the old Sabbath-law. The first converts from Judaism were at liberty to observe '*ex devotione*' the Jewish Sabbath side by side with the Christian Sunday, but in general the Christians were opposed to such judaizing inclinations, and they were equally unaware of a parallel between the Jewish Sabbath and the Christian Sunday, save for their common characteristic of both being weekly recurring days devoted to divine service, on which work on the land should be stopped. So they rested, in order to observe God's day and thus it strongly resembled the Jewish observance of the Sabbath, but it never occurred to them that they were bound to do this in obedience to the Jewish Sabbath-law issued by God on Mount Sinai. Moreover the Decalogue, in so far as it is a positive declaration announced

to the Jews on Sinai, is only a part of the Mosaic code of law. And this we learn from the Apostolic Council at Jerusalem and from the epistle to the Galatians [23] the Apostles and the first Christians regarded as abolished by the advent of the New Testament. And yet it was clear from the beginning that many parts of this out-dated law had a definite value, especially the ten commandments, since they were derived from the irrevocable natural law which God had imposed on His creation and which therefore must last. It was in this sense that the Fathers understood the Decalogue, and in this way they interpreted Christ's words that he came to perfect the law.[24] Christ corrected the narrow literal sense of the Jewish interpretation, said the Fathers, by forbidding not only the doing of evil but even the desire to do evil, not only actual sin but even the cause and occasion of sin. But although the early Fathers accepted the validity of the natural-moral laws contained in the Decalogue, (as distinct from the abolished ceremonial law of the Sabbath), still they did not make the ten commandments the backbone of Christian morality, as we do. The moral instructions for the catechumens were based on the difference between the two ways, namely the way of life which consisted in the keeping of the two commandments of love, and the way of death which is that of mortal sin, and this catechetical method was characterised by its stressing of the new legislation described in the Sermon on the Mount. Reference to the law of Sinai separately or together, occurs seldom and is usually done only from an apologetic point of view, or to stress the superiority of the Christian laws. The acceptance of the Decalogue as the framework of Christian morality we owe to St. Augustine, and the occasion for this important change was the struggle with the Manichaeans. They were dualists and attributed the Decalogue to the Evil Principle, while according to them only the new law came from God. Therefore St. Augustine

[23] Chs. III-V.

[24] *Matth.* V, 17.

deemed it necessary to stress both the divine origin of the Decalogue and its lasting validity as a norm for human conduct. If the New Law not only forbade evil deeds but also evil desires, it went no further than the Old Law properly understood, according to Augustine. And the double commandment of love proper to Christianity, far from being in contradiction to the Old Covenant, was as St. Paul teaches, its synthesis and fulfilment.[25] We have St. Augustine to thank for our classification of the ten commandments. The arrangement of them which he introduced is logical rather than according to the text, and as such it has been universally accepted by Catholics since his time.

But before he could propose the Decalogue as a satisfactory scheme for catechesis, he had first to explain the true value of the Sabbath-law. It is striking for the patristic era that he did not explain the Sabbath-law as the prototype of the Sunday law, and that he did not take the Jewish day of rest as a norm for the Christian day of rest. He taught that the Jewish Sabbath belongs to the past and that it makes no difference whether we feast or fast, work or rest on the Saturday. The Sabbath-law has lost all legal force "*quia vetera transierunt, cum eis transit etiam carnalis vacatio sabbati*". It only contains an allegorical lesson for us: "*Ideoque inter omnia decem illa praecepta, solum ibi quod de sabbato positum est, figurate observandum praecipitur, quam figuram nos intelligendam, non etiam per otium corporale celebrandam suscepimus . . . Sabbato enim significatur spiritualis requies*".[26] The sharp distinction which St. Augustine makes between the moral laws of the Decalogue which are still valid and the dead out-dated Sabbath regulations crops up from time to time during the dark ages,[27] even though there it is often overshadowed by the Sabbath mentality.

[25] *Contra Faustum Manichaeum*, l. XV, c. 4, sq.; l. XIX, c. 18, sq.; *Sermones* 8, 9, 33, 109.

[26] Ep. 55, *Ad Inquis. Januar.*, C. 12, n. 22.

[27] St. Isidore, *in Exod.*, C. 29; Pseudo-Beda, *De Psalm. lib. exegesis*, *P.L.*, t. 93, c. 481, sq.

With the coming of St. Thomas Aquinas, who gave scholastic form and precision to the Augustinian teaching, the confusion due to the sabbatarian parallelists were banished more or less thoroughly from Catholic theology. He pointed out that the ten commandments with the exception of the third were only an explanation of duties to which man was already bound by natural law. The third commandment differs from the others in this that it is partly moral, i.e. natural law, partly ceremonial, i.e. positive divine law. In so far as man led by his common sense is bound to set aside a part of his time and devote it to his spiritual life, as he must also do for the other natural needs of life, it is a natural-moral law which imposes a permanent obligation. But in so far as it determines the constantly recurring day for this duty, or the way in which it is to be fulfilled, it is a positive ceremonial law imposed by God on the chosen Jewish people, and binds only for the duration of the Mosaic law.[28] Duns Scotus did not fully agree with this. According to him the commandments on the second tablet did not belong to the natural law, since God dispensed from them sometimes. Their power is derived only from the new relation in which they stand to the necessary principles of the natural law.[29] But later theologians have almost all accepted the Thomistic teaching, with the added explanation of St. Bonaventure that these prescriptions although natural law, had to be revealed to sinful mankind, because of its blindness since the fall. Without revelation they would not have been clear and certain enough to serve as a rule of life. But although the revelation on Sinai gives greater clarity and certainty to our knowledge, regarding the principles of the natural law, their character is not altered for Christians by the fact that a positive ceremonial law was added to them. Their authority and explanation is not derived from the text of the Pentateuch, but from the rules of common sense. Hence it follows that, in

[28] S. Th., 1a 2ae, Q. 100, art. 1, 3, 11; 2a 2ae, Q. 122, art. 4.

[29] IV Sent., l. III, dist. 37; cf. *Dict. Theol. Cath.*, t. IV, c. 168.

opposition to the opinions of the Antinomians, who were condemned by Trent [30] the observance of all the commandments save the Sabbath law is a Christian duty. Moreover Christ has expressly proclaimed their natural validity for His followers namely in Mt. XIX, 17; Mc. X, 19; Lk. XVIII, 20. And in each of these three texts, a summary is given of the essential commandments, but not a word is said about the Sabbath-law. So from all this it should be clear enough, that, although the Decalogue remains in force, with the coming of Christ the Sabbath has ceased to be of obligation.

8. *Opera Servilia.*

The term '*opus servile*' is a product of the sabbatarian parallelism, which based the Sunday observance in the Middle Ages not on Apostolic tradition but on the third commandment of the Decalogue and which adapted it to the instructions of Exodus and Leviticus. The Code uses the term '*opera servilia*' only once, and gives no further definition for it, and drew up lists of works considered to be servile, but instead of elucidating the problem this has only further confused the issue. The term '*opus servile*' dates really from the Old Testament, where it is used in connection with the rest prescribed on the Sabbath day. Suarez notes that on some days all work was forbidden, while on others only '*opus servile*' was not allowed. But even this does not help us to get a clear definition of the concept of '*opus servile*' in the Old Testament. This vagueness offered no difficulties to the Christians of the first centuries; they did not need such a definition. In all the literature of the first five centuries there is not a single reference to the term '*opus servile*', save in a commentary on a passage in the Old Testament where this term received its juridical meaning for the first time. But even there it is not explained in the meaning of heavy manual work done by slaves, but of the slavery of sin. So our modern distinction between servile or forbidden works and permissible

[30] Sessio VI, c. 19.

works, does not derive its origin from Christian antiquity. Where then does it come from? In an attempt to stem the sabbatarian interpretation the Council of Orleans in 538 branded all rigorism as a Jewish rather than a Christian celebration of the Lord's day and decreed: "*Ut in die dominico quod antea fieri licuit, liceat. De opere tamen rurali censuimus abstinendum, quo facilius ad ecclesiam convenientes orationis gratiae vacent*".[31] Even if the decree stemmed excesses it was unable to restrain the sabbath-parallelism in its progress, and a definite step towards total identification followed some years later in the same century when the great Spanish Archbishop, St. Martin of Braga, in his book "*De correctione Rusticorum*" (c. 18) accepted not only the parallel with the Sabbath, but also the Sabbath-terminology. The Council of Orleans had rejected the term 'farm-work'. But St. Martin of Braga went a step further and forbade all 'servile works', which he expressly identified with 'farm work' when he said: "*opus servile, id est, agrum, pratum, vineam vel si qua gravia sunt, non faciatis in die dominico*". And by unearthing the term '*opus servile*' from the limbo of the Old Testament ritual and explaining the Sunday observance in the terminology of Leviticus, he was the first to forbid farm work under this new title and as W. Thomas remarks,[32] "We find the Irenaean concept of identifying '*servile opus*' with '*peccatum*' on Sundays for the first time used as a technical term to include the whole class of works forbidden on Sundays."

The expression was not immediately accepted everywhere, but crept in unnoticed. In some places there was a reaction against it and Pope Gregory the Great in 603 opposed the Judaizing interpretation of the Sunday observance in a letter to his bishops, in which he stressed, however, that Christians "*Dominica die a labore terreno cessandum esse*".[33] He uses here '*labor terrenus*' but not '*opus servile*' or '*opus rurale*'

[31] Can. 28, Mansi, t. IX, c. 19.

[32] *Der Sontag im frühen Mittelalter*, p. 29, Göttingen, 1929.

[33] *P.L.*, t. 77, cc. 1253-1255.

—a far more general term, therefore. Despite the opposition, the terminology derived from the Sabbath-law began to gain ground and in 630 King Dagobert promulgated a law concerning Sunday observance in the words: *" Die dominico nemo opera servilia praesumat facere, quia hoc lex prohibuit et Sacra Scriptura in omnibus testavit "*.[34] And the Council of Rouen adopted this civil law as a church law. So it came about that at least in the Frankish empire the Christian Sunday assumed a Sabbath air. In the following centuries it was accepted as a generally agreed concept that Sunday rest was the same as abstention from servile work for 24 hours from Saturday night till Sunday night. Council and bishops, books and preachers, all accepted this explanation and developed it, whilst the secular arm made it obligatory and enforced it with stern measures.[35]

The great scholastics of the 13th century found the expression *' opus servile '* in general use in church laws dealing with the sanctification of the Sunday and they commented on this expression in their commentaries on the third book of the Sentences of Petrus Lombardus. St. Thomas also deals with the question in connection with the third commandment of the Decalogue [36] where he says expressly that the Sunday observance is not derived from the Jewish prescriptions for the Sabbath, but that it replaces and substitutes it, and that it has been introduced by the Church herself and by the customs of the Christian community, *" Observantia diei dominicae in nova lege succedit observantiae sabbati, non ex vi praecepti legis, sed ex constitutione Ecclesiae et ex consuetudine populi Christiani "*.[37] But it was not St. Thomas' fault that the church laws had taken the Mosaic law regarding servile work as the norm for the sanctification of the Sunday and hence all that he could do was to accept and comment on the ex-

[34] Mansi, t. XI, *Aooed.*, c. 47-48.

[35] Cf. *Clergy Review*, 1935, pp. 276-278.

[36] 2a 2ae, Q. 122, art. 4.

[37] *L.c.*, ad 4um.

pression. He distinguishes three kinds of '*servilitas*': to sin, to men, and to God. '*Servilitas*' to another man consists in the physical work done for another in his service. But some of these forms of work are the same both for master and for servant, such as cooking, keeping house, tending the sick, etc. Hence the law must be understood in its secondary meaning as applying only to those bodily activities which are proper to slaves and which are done in another's service. And only these are forbidden on Sundays. So St. Thomas stuck to the logical definition, namely: servile work is only work done by slaves.

The popularisation of the Thomistic teaching is due to the *Summa* of St. Raymond of Pennafort, the standard textbook for confessors and pastors in the Middle Ages.[38] But Raymond taught a watered down form of the Thomistic teaching, by stressing rather the object of the law i.e. Divine Worship, and this began to play a large role with later writers. Certainly it is undeniable that an action done to earn money is just as big a hindrance to spiritual concentration, and just as badly motivated as the "*esse corporale et servientibus proprium*" of an act. This is why subsequent writers attached more and more importance to the motive underlying an action, in judging whether or not it was an '*opus servile*'. Thus we find towards the end of the fifteenth century in the much used casuistic textbook of Angelo of Clavasio (+1495):[39] "*Opus servile est omne opus corporale ordinatum sicut ad principalem et primum finem, ad bonum corporis temporale seu ad lucrum, et istud est illud quod prohibetur de praecepto diebus festivis*". Also St. Antoninus in his *Summa Antonini*[40] brands as servile work, "*scribere pro pretio*". The Sorbonne in 1426 in its paraphrase of the Thomistic teaching, said amongst other things, "We must abstain from servile works which could distract us from religious exercises; servile work

[38] Cf. *Summa Raymundi*, lib. I, tit. XII, s. 1, Veronae, 1744, p. 110.

[39] *Summa Angelica*, art. *Feriae*, n. 9, sq. ed. 1513, folio 110.

[40] T. II, 1740, c. 985.

done with a view of profit making is forbidden". St. Bonaventure accepted this definition in his commentary:[41] "*Talia dicuntur opera servilia et prohibentur, illa maxime in quibus homo inhiat terrenis lucris*". He also maintained that the factor which determines the *servilitas* of a work is not so much the nature of the work itself as the purpose which the worker has in view. The authors of the later Middle Ages disagreed with St. Thomas' teaching, since it clung too closely to the literal and logical meaning of the expression '*opus servile*' without considering the '*causa motiva*' of the law, namely to exclude obstacles to Divine Worship on Sundays. Therefore they began to develop a new definition of servile work. That was bound to end in a fiasco. You cannot get away from the logical definition: what is *servile,* is *servile!* What was and is still needed was a modification of the text of the law. Custom has limited the prohibition to purely servile works, and custom could have brought it about that not only heavy manual work was forbidden, but all occupations rendering a suitable keeping of the Sunday difficult or impossible. The old rule remains true: "*Finis legis non cadit sub lege*". But then a definition would have to have been found forbidding both servile work and other work irreconcilable with the observance of the Sunday. This the Summists failed to do. They tried to twist the terminology they had, so as to include the intention of the worker—the motive of earning a living or making profit. In this way they laid themselves open to the attack which Cajetan, followed by the Salmanticenses, Suarez and Busenbaum, launched against this teaching.[42] He totally rejected the idea that the absence or presence of the motive of gain could determine whether or not an activity was servile, and thus forbidden on Sundays. Busenbaum[43] went back to the old definition of servile work as work usually done by slaves, and the importance and influence of his book and hence

[41] III Sent., dist. 37, dub. 3.

[42] Comment. in 2a 2ae, Q. 122, a. 4, Romae, 1773, t. VI, p. 216.

[43] *Medulla Theol. Mor.*, lib. 3, Tr. 3, cap. 1, dub. 1, resp. 1.

views can be gauged from the fact that his book had gone through 200 editions by 1776 and was commented on and followed by St. Alphonsus, la Croix, Ballerini, thus handing down this idea to our own modern textbooks.

It should be clear by now that the present teaching is not that of the first centuries. It has arisen out of the '*lex consuetudinaria*' many centuries ago, when circumstances were different from what they are now. St. Thomas, on whose teaching the present day interpretation rests, explained the law as he found it in the customs of the people of his time, and as it had been supported by local Councils and Church authority. The Holy See has said very little on this subject and whenever the Popes spoke about it, they did not issue new laws but dealt with the problem as they found it in '*lex consuetudinaria*'. Even the Council of Trent, so interested in reforming Christian life, has hardly said a word on the whole subject. It encourages the pastors to see to it that the Christian people remain faithful in those things which lead to an increase in piety such as "*dierum festorum devota et religiosa celebratio*". That is all! [44]

In brief, what we have to-day is with a few minor exceptions, an interpretation of the law based on the customs of the Middle Ages, or at most a theory built on customs in force centuries ago, but long since dead and buried. The law of our method of Sunday observance has grown out of customs, and was for centuries regulated by the Christian instinct without any ecclesiastical law. Theories about this custom only appeared on the scene centuries later, and when they did appear, their only '*raison d'être*' was to be helpful in finding a definite formula for it. But instead of formulating a definition whose first aim should have been to preserve the flexibility of adaptation, which is so characteristic a property of the '*jus consuetudinarium*', they strove to replace the '*jus consuetudinarium*' by a bookish '*jus scriptum*', based essentially on a philosophical concept of the term 'servile work'. Conse-

[44] Sessio XXV, cont., decr. *de diebus festis.*

quently custom and common opinion were said to be capable of nothing better than weakening and watering down a law, and the interpretative voice which is theirs by right as first-born, was denied them. There has been too much etymological theorizing and too little doctrinal adaptation to changed circumstances, which is demanded of a law whose definition and determination must depend upon the '*consuetudo*' of loyal Christians of all generations, as St. Thomas himself said: "*Opera secundum se considerata immutari possunt pro loco et tempore*".[45]

9. *Modern Definition and Interpretation.*

Modern theologians mostly give definitions of servile work, which follow logically from the literal meaning of the words. Vermeersch:[46] "*Opera servilia sunt ea quae immediate ordinantur ad utilitatem corporis, labore corporali potissimum perficiuntur, et antiquitus a servis fieri solebant*". Davis[47] "True servile work is forbidden, namely, such as is done by servants or hired manual labourers, and requiring bodily rather than mental activity". Aertynys-Damen[48] "*Opera servilia sunt quae utilitati corporis immediate inserviunt et ideo per servos fieri solebant*". Sipos:[49] "quae viribus corporis potissimum, ad commoda corporis fiunt". Noldin-Schmitt:[50] "*Quae ad commoda corporis ordinantur, corporali labore potissimum exercentur et antiquitus a servis fieri solebant*".

All these authors are of opinion that servile work only refers to physical work done for bodily needs and by persons in the service of others. The determining factor which forbids servile work on Sundays is, according to all except Noldin, the

[45] 2a 2ae, Q. 122, art. 4, ad 4um.

[46] *Theol. Mor.*, ed. altera, 1927, n. 865.

[47] *Moral and Pastoral Theology*, 3rd ed., 1938, II, p. 66.

[48] *Theol. Mor.*, ed. 13a, 1939, Vol. I, 507.

[49] *Enchiridion Iuris Canonici*, ed. 3a, 1936, p. 692.

[50] *Summa Theol. Mor.*, ed. 27a, 1941, II, 265.

'*natura operis*', the intrinsic nature of the work, while in doubtful cases the '*communis aestimatio*' must be taken into account. Noldin, however, thinks that we must take as a norm, "*non tam natura operis sed potius an talis servitus hominis inducat ut impedimentum creet cultui animae, familiae et Dei—etiam ob lucri cupiditatem*". The fact that the '*jus consuetudinarium*' and the healthy viewpoint of the people are recognised by the authors as important factors in determining, not what constitutes servile work, but whether this or that work is permissible on Sundays according to common Catholic opinion, is in itself nothing new but is important in our dispute. For the striking thing is that the '*vox populi*' is influenced by the very factors which according to the book-definitions must be given the least consideration in determining the lawfulness of a servile work. The '*vox populi*' takes into account whether or not a job is done as the exercise of a trade or as a hobby, for profit or as a pastime, whether it is greatly or only slightly tiring, and judges its lawfulness by these norms, i.e., according to the '*finis operantis*', whilst the books stubbornly keep to the '*finis operis*' as the sole norm. The '*consuetudo*' which according to Can. 25 can develop into a law, also adds a word in favour of the '*finis operantis*'-opinion. One is tempted to ask whether the time has not come for a new definition of forbidden works, with much less stress on the intrinsic nature of the action and much more on what is or should be the real determining factor, namely the common opinion and custom of the Christian community. Or in the words of Ballerini:[51] "*Communis sensus et consuetudo inde proveniens optime explicat legem, et melius servile opus definire solet, quam definitio quaelibet a Doctoribus laboriose excogitata*", in other words that and that alone is servile work and forbidden which the average man considers servile and which the common judgement and custom of Christians explain as a breach of the Sunday rest. Originally

[51] Ballerini-Palmieri, *Opus Theologicum Morale*, tr. VI, s. 3, Prati, 1890, t. II, p. 516.

the standard teaching of the moral books was based on the opinion of the average practising Catholic. The law developed out of this. In the course of time they have got out of step, and now it is just the reverse: the teaching no longer follows the '*jus consuetudinarium*', but the inclination is there to force the law of custom to fit the wooden teaching of the books. Owing to the development of industrialisation, the dividing line between servant and master, slave and lord, has in practice died out. The mentality of the people has kept pace with the changing surroundings, but the textbook theology has stuck to its 17th century opinions. The difficulty is that the textbooks, despite the greater flexibility of their more modern definitions, still regard all manual work as more or less servile, and catechists and catechisms naturally follow this lead. Since the 6th century, when the law was first formulated, until the 18th century the greater part of the population was agrarian, so that many Councils even spoke of '*opera ruralia seu servilia*', identifying the two. Then came machinery and all was changed: new industries, factory hands, and alongside of these came into existence a class of black coated workers such as clerks, typists, travellers, etc. All of them factory workers as well as office workers are wage earners, employees probably working for the same employer. The mechanic or factory hand considers himself every bit as good as his brother the clerk, and it may well be that their wages are equal. To speak of one therefore as a slave doing '*opus servile*', and of the other as a free man doing '*opus liberum*' is nonsense and betrays a confusion of values which may awaken nostalgia for the Middle Ages, but certainly does not reveal much common sense. And when the mechanic and typist go and work in their little garden on Sunday, doing '*opus rurale*' therefore, they call that recreation, hobby, etc., and would be shocked if we would prove to them from our moral theology books that '*opus rurale*' is definitely '*opus servile*' and hence forbidden on Sundays. And indeed from the authors quoted we see how our standard moral theology

books adhere to the medieval terminology and outlook, condemning such work which '*ex fine operis*' remains an '*opus servile*' since it is '*opus rurale*' and cannot be made lawful by the '*intentio agentis*'. But whatever the books and catechisms say, the good average Catholic distinguishes between manual work as livelihood and as a hobby and recreation. "*Lex fit ex constitutione principis et moribus populi*".

10. *Application to the Missions.*

So here we have a textbook tradition, which stopped dead centuries ago, while on the other hand we have the living organism of general opinion and the healthy consciousness of a Catholic population, which has developed and thus altered its outlook on this question and also its customs.

The missionary has to choose when introducing a Catholic tradition in the missions, either the rigid book tradition, or the living application of this tradition as practised by Catholic communities. The concept of slave's work does not suit the case very well. 'Women's work' would be a better term for the African circumstances for it is they who do the hard work and the '*opus rurale*' is their special task. Few of the African natives work for their living, as we understand it in the civilized countries; they vegetate, laze, and if needs be they will probably go to market, go hunting, patch up or rebuild their huts, while the educated youths work as clerks or practise a trade. If we teach them that '*opus servile*', explained in the sense of heavy manual work, is forbidden, it will of necessity follow that office work, interpreting, buying and trading, are not forbidden. But we want to stop these activities as well on Sundays, so as to get these clerks and shopkeepers to observe the Lord's Day like the rest. But then we must include something more in our definitions besides the '*opus servile*'. Are we then to say that all occupations whereby people earn their living on weekdays are forbidden? If so, we shall do something which according to moralists is not intended, namely apply the norm of the '*finis*

*operantis'*, whilst according to the moral theology handbooks we have to limit ourselves to the use of the '*finis operis*' as our norm. We would suggest that we must consult not only textbooks, but also modern periodicals in order to come to an all-round solution. These questions are often treated in the periodicals and the general tendency in these articles is to take the factor of money making or the purpose of livelihood into account: the '*finis operantis*' in other words. The latter also pay more attention to general Catholic customs and ideas regarding this commandment. The authors so far quoted only allow custom and Catholic mentality to be taken into account as criteria for doubtful cases. Father Jombart [52] combats the disjointed theories of the modern moralists with regard to sanctifying the Sunday and expresses the hope that they may be brought to revise the categories of forbidden works, which they have copied from one another for centuries. McReavy in his articles in the *Clergy Review* for 1931, 1935 and 1941 pleads for an adaptation of the Sunday law to modern circumstances. Berte [53] urges acceptance of the motives: profit, recreation, livelihood, as an integral part of the definition of works forbidden on Sundays; while Michaud [54] wants a new definition of servile work as being: the exercise of a trade, of a weekday occupation, done for a wage; Sanders [55] argues that unification and adaptation is needed to suit the antiquated definitions to modern conditions.

So we could go on quoting writers who are all agreed that the book definitions are no longer sufficient. But the trouble is that you cannot introduce a new custom into the missions without infringing a recognized law. The law is clear. '*Opera servilia*' on Sundays are forbidden by Can. 1248. But the lawgiver has not defined '*opera servilia*' any further, and we must consult tradition for a further definition of term. The

[52] *Revue des Communautés Religieuses*, 1931, pp. 27, 58, 96.

[53] *Nouvelle Revue Théologique*, Vol. 63, 1936, p. 56.

[54] *Revue Apologétique*, Vol. 62, 1936, pp. 290-303, 462-473.

[55] *Clergy Monthly*, 1946, pp. 145-160; 1947, 181-192.

book definitions nearly all exclude '*finis operantis*' as a factor to be taken into account, whilst we feel that it should not be excluded. The '*consuetudo populi Christiani*' does consider it in judging which works are allowed and forbidden on Sundays. And as Can. 29 says: "*Consuetudo est optima legis interpres*". Hence where this '*consuetudo*' differs from the theoretical interpretation of the law, not the '*consuetudo*' but that interpretation asks for a revision. But where there is as yet no Christian community of long standing in the missions, there can be no question of a custom having grown up in that community. For a '*consuetudo*' grows from within a community and cannot be introduced or grafted on from outside. And that is exactly the trouble in the missions. The only way to a possible solution is for the local Ordinary to give an official interpretation of the '*opus servile*' for his province or mission, thus introducing a '*consuetudo secundum legem*'. And that is possible!

11. *Attempt at a Solution.*

It was Father Sanders S.J.[56] who suggested that a precedent in a similar sphere and relating to a law very much resembling the Sunday law has been created by the introduction of the new fasting law into Holland, Belgium, and India.

According to Can. 1251 the fasting law binds us to take only one full meal to which something may be added morning and evening according to the custom of the place. All our Moral books try to define that something, that quantity, some in a percentage of the meal taken on ordinary days, others in pounds and ounces, weights and measures. There does not seem to be a recognized custom which goes counter to this theoretical interpretation, in any case nothing like the existing customs against the theoretical interpretation of the '*opera servilia*'. But many good Christians were unable to keep the fasting law according to that interpretation; they had to work, and to do that they had to be dispensed or excused from the

[56] *Clergy Monthly*, 1947, pp. 181-192.

laws of fasting. Some only took half a breakfast so as to do something in the spirit of the law, but they did not regard that as keeping the law. There was no '*probata consuetudo*' which interpreted the fasting law in a different way to the Moral books. The Dutch Hierarchy by the collective Lenten pastoral of 1950, doubtless in imitation of what the Provincial Council of Malines had done in 1937,[57] gave its own interpretation of '*consuetudo*' by introducing and sanctioning the relative fasting method. This method is not merely tolerated together with the old method for those who would otherwise be unable to fast, but it is made obligatory for all.[58] By this unique ruling the official calculation in pounds and ounces, weights and measures, as given in the books, has been set aside. The relative method, adapted to the personal needs of the individual, has been introduced. The bishops decided by this measure what the '*consuetudo*' spoken of in Can. 1251, should be for Holland. There is here no question of a '*consuetudo*' in the sense of a recognized juridical custom, which can only acquire right of existence after forty years, and which quashes an existing law, or introduces a new obligation. This sort of '*consuetudo*' is dealt with in the Code in CC. 25-30. But in our case there is no question of abolishing an old law or introducing a new one, but of how to carry out a law already in existence and still in force. So the term '*consuetudo*' in connection with the fasting law (and in other canons, e.g. 462, 6, 1535) only refers to a way of acting approved of locally in the keeping of a particular law.[59] The approval of this way of observing a precept does not need to find this way of acting already cut and dried—in that case it would be superfluous; but it can more or less determine it. So it is not needed that '*consuetudo*' should be understood in the sense of something which has developed out of the practice of many years, but

[57] *Acta et Decreta Conc. Prov. Mechl. Quinti, 1937, Mechliniae habiti*, Mechl., 1938, n. 69.

[58] *N.K.S.*, Febr., 1950, p. 33.

[59] Cf. E. Bergh, S.J., *Nouv. Rev. Théol.*, 1938, p. 1061.

the authority of the Ordinaries or of a Provincial Council can determine what must be considered as an approved way of acting in a particular province or mission. The Dutch bishops, the Council of Malines and the Indian Council of Bangalore (1950) have acted thus and Rome has approved this new method of interpreting and introducing a new '*consuetudo*'.

The Holy See allows therefore the introduction of a new interpretation of an old law, and so a new general custom is introduced and established, not by growing up from within the community but by being grafted on to the community as it were.[60] This interpretation can also be applied to the law of Sunday observance regarding '*opera servilia*'.

## Conclusion

Missionaries in their pastoral practice are often faced with the problem that the Codex speaks of '*consuetudo*' while it is up to them to introduce these customs by building up a Christian tradition in heathen surroundings. There can be no question then of an already established custom, but of introducing from above an approved line of action regarding the keeping of a precept. And since they must do that in other circumstances, why should they not do it in introducing a new interpretation and adaptation of the Sunday law regarding '*opera servilia*' in such a way, that the faithful must abstain from activities which constitute their ordinary means of livelihood and would hinder them in paying the necessary tribute to God of Divine Worship.[61]

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[60] Cf. Kelly, C.Ss.R., *Forbidden Sunday and Feastday Occupation*, Cath. University of America, 1943; McReavy, *Ephem. Theol. Lovan.*, 1935, pp. 291-323.

[61] Cf. *L'Ami du Clergé*, 26 Nov. 1953, p. 727.

# PERMISSION TO WRITE FOR PUBLICATION: A DISCUSSION OF CANON 1386

## Part I *

AN address of the Reverend Doctor John A. Goodwine to a regional meeting of The Canon Law Society of America at New York City in May, 1949, noted that the canons on censorship "offer a fertile field for canonical research" and that there "is comparatively little written on the subject, at least in English." On the kindred question of permission apart from censorship, which is actually a continuation of the problem, there is even less written.[1] The sure-handed enlightenment Father Goodwine has brought to those canons is still lacking for canon 1386, which outlines the permission necessary to publish writings apart from the matter of censorship.

This permission, which must be obtained from superiors, at times by the layman, but for the most part by the secular cleric or religious, is differentiated from censorship. Censorship is concerned directly with the thing written, the book,

* Part II, the concluding section of this Article, will appear in the July number of the current year.

[1] On the canonical questions of censorship and permission apart from censorship, the only book-length study I have found is a published doctoral dissertation submitted to the University of Laval. Its author is Rev. Edouard Gagnon, p.s.s., *La Censure des Livres* (Montreal, 1945). In English I know of only one article-length study, the publication of the address referred to; this does not touch the question of permission apart from censorship, Rev. John A. Goodwine, "Problems Respecting the Censorship of Books," *The Jurist*, X (1950), 152-183; Rev. Nathaniel Sonntag, O.F.M., devoted his doctoral dissertation to the legislation concerned with special types of writing, e.g., canonization, indulgences, decrees of the Sacred Congregations, liturgical books, litanies, etc., *Censorship of Special Classes of Books* (Washington, D. C., 1947). The quotations from Father Goodwine, who is Professor of Moral Theology and Canon Law at St. Joseph's Seminary, Yonkers, New York, may be found on page 181 of his article. I should like to express my indebtedness to Union Theological Library for permission to use its rich collections and to Mrs. Foster, the director of its reference department.

magazine or article; permission with the person who is the author of the writing.[2] Their purposes differ; censorship seeks to exclude from print whatever might be harmful to the commonweal because of its immorality or hostility to religious truth; the objective of permission is the encouragement and attainment of an obedient spirit among subordinates.[3] Through this permission, the " family " of the Church—those who have in a voluntary manner, out of love for Christ, pledged themselves to the living exemplification of the evangelical counsels—is helped to function harmoniously and effectively in the apostolate of the printed word. This orderly safeguard secures to the bishop an opportunity, should there be special reasons present, apart from censorship itself, to interpose his authority and impede publications which might be unwise or worse.[4] He may wish to encourage or guide those literary abilities, and it is well for him to know where such talents lie, should his own needs require them.[5]

The following outline, to be followed in this treatment of canon 1386, should facilitate the progress of the reader through the divisions of the discussion and should also provide a helpful frame of reference.

[2] Rev. Matthaeus Conte a Coronata, O.M.C., *Institutiones Juris Canonici,* II (Taurini, 1939), n. 954, p. 316.

[3] Leo XIII, const. *Officiorum ac munerum,* 25 Jan., 1897, *Acta Sanctae Sedis* (Romae, 1868-1908), XXIX (1897), 388-400; *Codicis Juris Canonici Fontes,* III (Romae, 1923), n. 632—hereafter cited respectively as *ASS* and *Fontes;* Rev. Albertus Blat, O.P., *Commentarium Textus Juris Canonici,* III (Romae, 1923), pars II, n. 274, p. 335; Rev. Charles Augustine (Bachofen), O.S.B., *A Commentary on the New Code of Canon Law,* 3rd. ed., VI (St. Louis, 1931), p. 441; Rev. A. DeMeester, *Juris Canonici et Juris Canonico-Civilis Compendium,* novae editio, III (Brugis, 1926), pars I, n. 1341, p. 261; Rev. Stephanus Sipos, *Enchiridion Juris Canonici,* ed. 3 (Pécs, 1936), fn., p. 752.

[4] Rev. Joseph Brys, *Juris Canonici Compendium,* II (Bruges, 1949), n. 820, p. 198; Rev. Franciscus X. Wernz, S.J.-Petrus Vidal, S.J., *Jus Canonicum,* IV (Romae, 1935), pars II, n. 715, p. 144.

[5] Gagnon, *op. cit.,* n. 248, p. 125; Rev. Emile Jombart, S.J., " Censure des Livres," *Dictionnaire de Droit Canonique,* III (Paris, 1942), col. 167—hereafter cited as *DDC.*

Outline

I. Canon 1386, § 2—Permission to write in anti-Catholic or immoral papers and periodicals
   A. When contribution is justified
   B. What papers and periodicals are proscribed?
      1) anti-Catholic papers and periodicals
      2) immoral papers and periodicals

II. Canon 1386 § 1—Permission to contribute to other papers and periodicals and to publish books
   A. Types of permission
   B. The meaning of "to contribute" (*scribere*)
   C. Are religious publications included?
      1) status of the question
      2) papers and periodicals
      3) books:
         a—the meaning of "also" (*quoque*)
         b—the old law
         c—canon 1385 § 3
         d—permission vs. censorship
         e—a *casus conscientiae*
         f—conclusion
   D. From whom is this permission obtained?
      1) for secular clerics
      2) for religious

## I. Canon 1386 § 2—Permission to write in anti-catholic or immoral papers and periodicals

### A. *When contribution is justified*

Canon 1386 treats of permission in two sections. It will be easier to begin with the second, which deals with written contributions to publications of an anti-Catholic or immoral nature; the other part of the law presents lengthier difficulties. This second section reads:

> For papers and periodicals which attack the Catholic religion or good morals, not even laymen shall write anything except

> for a good and reasonable cause, to be approved by the local Ordinary (1386, § 2).[6]

Here the prohibition is stringent, outlawing even a single piece concerned only with a secular topic.[7] For its basis, there is the natural law itself, which bars us generally from aiding the cause of evil or closely regulates any actions possibly having such an effect.[8] Unwarranted cooperation of such a sort could be shamefully indicative of a lax conscience or weak faith on the part of any Catholic, not alone a cleric.[9]

> Generally speaking, articles in such organs would fail to produce any good effect. The writer will be disregarded by the geunine supporters of the organ and regarded with suspicion by Catholics of true spirit. Some Catholics, full of more zeal than discretion perhaps, might rush into a defense without sufficient preparation, and thereby seriously injure the cause they would defend. Another end would seem to have been to save the faithful from falling into *error;* for seeing Catholics and priests writing for such papers, they would gradually be led to put trust in the principles advocated by such organs. Finally, he [the legislator] may have intended by the present Rule to lessen the circulation of such papers and periodicals.[10]

As its wide sweep touches many pertinent aspects, this paragraph of Father Hurley deserves to be noted. His comments were made on the previous law, article 22 of the Constitution *Officiorum ac munerum,* which served as source for canon

[6] "In diariis vero, foliis vel libellis periodicis qui religionem Catholicam aut bonos mores impetere solent, nec laici Catholici quidpiam conscribant, nisi justa ac rationabili causa suadente, ab Ordinario loci probata." All English translations are from Rev. Stanislaus Woywod, *A Practical Commentary on the Code of Canon Law* (N. Y., 1943).

[7] Coronata, *op. cit.,* II, n. 955, p. 320.

[8] Brys, *op. cit.,* II, n. 820, p. 199; Rev. Udalricus Beste, O.S.B., *Introductio in Codicem,* ed. 3 (Collegeville, 1946), p. 699.

[9] Wernz-Vidal, *op. cit.,* IV, pars II, n. 715, p. 146.

[10] Rev. Timothy Hurley, *A Commentary on the Present Index Legislation* (N. Y., 1908), p. 168.

1386 § 2.[11] By demanding the consent of the bishop, the Code tightens this prohibition. Previously, the just and reasonable cause was left to the judgment of the individual writer. Because of the additional safeguard of episcopal assent, it is fitting to soften somewhat the misgivings expressed in the quotation. Against the possibilities for good of the concrete situation, those fears must be balanced.

To write in such periodicals or papers for the sole purpose of expounding Catholic doctrine that subscribers might peruse clear, correct notions of the faith would not usually be a justifying cause. Canonists in the past have not judged it sufficient; today it would be less so. To any person of good will, the means of securing the truth about the Church are easily at hand. Should the pages of these anti-Catholic or immoral publications take so lamentable a tack that rejoinder of some sort seemed warranted, a qualified apologist could undertake to defend the Church, protect the faith, and refute damaging charges; and it would probably be appropriate to do so in the offending publication itself. As a protection against possible self-delusion, however, the Ordinary should regularly pronounce on the validity of the justifying cause.[12] In an emergency situation, this permission could be presumed; then, as soon as possible, the bishop apprised of the action.[13] An important consideration in sending any material to these organs is the avoidance of scandal; so much so, that the Ordinary might advise the cleric or religious to withhold appending his name to the article, even while agreeing that it would be a good thing to have the piece inserted.[14]

[11] "Nemo e Catholicis, praesertim e viris ecclesiasticis, in huiusmodi diariis, vel foliis, vel libellis periodicis quidquam, nisi suadente justa et rationabili causa, publicet."

[12] De Meester, *op. cit.*, III, pars I, n. 1343, p. 262; Blat, *op. cit.*, III, pars I, n. 274, p. 336; Rev. H. A. Ayrinhac, S.S., *Administrative Legislation in the New Code of Canon Law* (N. Y., 1930), n. 234, pp. 281-282.

[13] Beste, *op. cit.*, p. 699; Ayrinhac, *op. cit.*, n. 234, pp. 281-282.

[14] Wernz-Vidal, *op. cit.*, IV, pars II, n. 715, p. 146.

B. *What papers and periodicals are proscribed?*

1) anti-Catholic papers and periodicals

It is not too easy at times to determine specifically what papers and periodicals fit the prohibition of the canon. Although the final decision belongs to the Ordinary, the problem also confronts potential writers. About Masonic or Communist papers or periodicals there would be no doubt; *New Masses, The Daily Worker,* are clearly *verboten.* With publications indiscriminately styled leftist, anti-clerical, or pink, it is well to probe labels; labels have come to cover too great a multitude, not only of journalistic sins, but of legitimate disagreements. Periodicals such as *The Nation, The New Republic,* at least during certain periods of their career, newspapers like the now defunct *New York Compass,* would seem to fall within the prohibition. So would the official "Voice" of definitely Red unions. Other newspapers and periodicals, which come to mind, and are best unnamed, at least raise a question. It is difficult to be precise; editorial control changes; there is often considerable fluctuation over relatively short periods.

2) immoral papers and periodicals

What newspapers might be proscribed on the score that they "oppose good morals" is questioned in a generic fashion by Augustine: "Is our so-called *yellow press* included in this class of publications? It would be difficult to give a positive answer to this question. For we cannot say that they make it a practice to attack the Catholic faith, though on the other hand, their scandalous reports on suicides, divorces, etc., are anything but favorable to good morals. Yet as these reports are not strictly attacks on morality, the solution depends on the general tendency of these publications." [15] I have seen old editions of one of the early New York tabloids, *The Graphic.* It may not have directly attacked morals, but surely the intent of the law would prohibit contributions to such a

[15] Augustine, *op. cit.,* VI, p. 144.

"scandal sheet." It would be quite superfluous, surely, to spend time demonstrating that the periodicals on the National Organization of Decent Literature Disapproval List, do attack good morals. Today it is certainly possible also that some of our tabloid newspapers and picture magazines would be opposed by the canon. To attack good morals it is not necessary for a paper to come out and confess that it is committed to an editorial policy deriding the Sixth Commandment, if such is exactly the overall effect of its pictures and stories. Seduction, rather than bludgeoning, often constitutes the more proficient attack on morals.

In accord with the purport of canon 1386 § 2, indeed some pause should be given to the practice of the ecclesiastic who would contribute, albeit worthwhile religious articles, to such publications. One cannot but wonder whether episcopal permission has been asked. The disparity between that isolated bit, and its context, has been found rather puzzling to the faithful. A paper, which in the past has carried clerical contributions, highlighted these titles for one edition: "Simone Silva Was A Naughty Girl," "Striptease Encore Was Murder," "Lacy Frills on Intimate Pretties." A priest-writer helps build a wide family audience. In the family parlor, Junior, who lives in a world—we are repeatedly warned—that bristles with juvenile delinquency, will not delay over the catechism lesson, but he may avidly devour the harmful companion stories and pictures.

## II. Canon 1386 § 1—Permission to contribute to other papers and periodicals and to publish books

### A. *Types of permission*

We turn now to the first section of canon 1386, which is much wider in scope and requires much lengthier comment:

> Secular clerics are forbidden to publish any books [16] on secu-

[16] Jombart writes: "Un ouvrage *profane,* au moins un livre au sens strict, car plusieurs commentateurs n'y comprennent pas les opuscules à cause de la distinction faite entre livres et journaux dans la même paragraphe." *DDC,* III, col. 167.

lar topics or to contribute to or edit daily papers or periodicals, pamphlets or booklets, without the consent of their Ordinaries; religious need the permission of both their own major superior and the local Ordinary (1386, § 1).[17]

As a preliminary, it is well to state here that writing anonymously, or adopting a *nom de plume,* would not circumvent the law. Such was the view of canonists on the similar legislation in article 42 of *Officiorum ac munerum;* [18] it found backing in a response of the Sacred Congregation of Religious, June 15, 1911,[19] and present-day commentators on the Code hold the same view.[20] Of course, once the cleric obtains permission in his own name, then he can, should he wish to, appear before the public under a pen name or anonymously; perhaps for a piece on humility.

The permission of which the canon speaks can be general, implicit, tacit and sometimes presumed; [21] usually lawyers recommend that it be given once and for all (*semel pro semper*). Thus, one grant of permission to a cleric to write for a particular organ would cover all contributions to that publication, unless in time the concession should be revoked.[22] Another permission could extend clearance to an individual

[17] "Vetantur clerici saeculares sine consensu suorum Ordinariorum, religiosi vero sine licentia sui Superioris maioris et Ordinarii loci, libros quoque, qui de rebus profanis tractent, edere, et in diariis, foliis vel libellis periodicis scribere vel eadem moderari."

[18] Hurley, *op. cit.,* pp. 228-229; Rev. Arturo Vermeersch, *De Prohibitione et Censura Librorum* (Romae, 1899), p. 105; L'Abbé A. Boudinhon, *La Nouvelle Législation de l'Index* (Paris, 1899), p. 267; Josephum Pennacchi, "Brevis Commentatio," *ASS,* XXX (1897-1898), 33, 511-512.

[19] *Acta Apostolicae Sedis* (Romae, 1909 sqq.), III, p. 270—cited hereafter as *AAS;* cf. the discussion in *Periodica,* VI (1912), 66-67.

[20] Gagnon, *op. cit.,* n. 256, p. 130; Beste, *op. cit.,* p. 699; De Meester, *op. cit.,* III, pars I, n. 1343, p. 261; Brys, *op. cit.,* II, n. 820, p. 198; Blat, *op. cit.,* III, pars II, n. 274, p. 336.

[21] Ayrinhac, *op. cit.,* n. 233, p. 281.

[22] Brys, *op. cit.,* II, n. 820, p. 198; Beste, *op. cit.,* p. 699; De Meester, *op. cit.,* III, pars I, n. 1343, p. 262; Rev. Dominicus Prümmer, O.P., *Manuale Juris Canonici,* ed. 5 (Friburgi Brisgoviae, 1927), q. 415, p. 497.

cleric to write articles for any and all papers and periodicals, exclusive, of course, of those covered by canon 1386 § 2. A kindred permission, only more limited, could permit the same cleric, or all clerics, to send only to Catholic periodicals and newspapers. According to Wernz-Vidal,[23] the canon does not distinguish between Catholic and profane periodicals or newspapers. None the less in actuality there is a real difference, which can rightfully be weighed when the bishop formulates his permission policy for the clergy. A Catholic publication would be expected to employ Catholic principles in accepting its subject matter. With such a safeguard, the bishop can afford to be generous with permissions to write for Catholic organs; can with reasonable assurance at times give a *carte blanche.*

Unlike censorship, which must be particular and concrete, permission, as has been mentioned previously, can at times be tacit and implied.[24] New importance is given to that fact by changes which have come upon clerical life in the United States in the past three decades or so. Most pertinent are two, namely, the large influx into teaching positions and the smaller influx into newly created, continually expanding, ecclesiastical bureaus. This expansion, paralleling on a lesser scale our growth and centralization in civil government, is seen in the history of the National Catholic Welfare Conference and the various diocesan organizations listed today in *The Catholic Directory.*

When a bishop appoints a priest to teach History or English in a university or college, is it not part of the *ex officio* duty of the priest-professor to contribute some writings in his field of training? Surely the bishop himself hopefully expects such fruits of scholarship. In these instances there appear to be grounds warranting at least an examination of whether or not an implied permission to write is present. Likewise, after the

[23] Wernz-Vidal, *op. cit.*, IV, pars II, fn. 33, pp. 144-145.

[24] Coronata, *op. cit.*, II, n. 953, p. 316; De Meester, *op. cit.*, III, pars II, n. 1340, p. 257; Ayrinhac, *op. cit.*, n. 233, p. 281.

bishop has installed a subordinate as head of a bureau of the diocesan Catholic Charities organization, almost necessarily, it would sometimes be a part of the cleric's fulfillment of such a post that he discuss in print the viewpoint of that bureau on certain problems whose solution constitute his workaday world. Between the Ordinary and his official family there is, presumably, liaison sufficient to have revealed his mind on the points deserving publication. This, too, would be the situation of clerics appointed to certain N.C.W.C. posts; again, the possibility of an implied permission to write seems deserving of investigation. Finally, things depend on the will of the particular bishop, the portfolio he extends can be either narrow or broad by virtue of particular focusing of the general law of the Code.

### B. *The meaning of "to contribute"* (scribere)

In canon 1386, § 1 the word "to contribute" (*scribere*) must be carefully noted, as it is a term less strict than "to write" (*conscribere*). When the code intends the all-inclusive "to write," it employs "*conscribere*," e.g., in § 2 of the same canon, even laymen are forbidden "to write anything" (*quidpiam conscribant*) in anti-Catholic publications. This is a sterner prohibition not sought apparently in employing "*scribere*." Hence, "to contribute" is here interpreted by canonists as meaning to write by way of habit, i.e., as a contributor, who regularly supplies a number of writings to the periodical or newspaper.[25]

[25] Beste, *op. cit.*, p. 699; Sipos, *op. cit.*, fn. p. 751; Gagnon, *op. cit.*, n. 259, p. 132; Augustine, *op. cit.*, p. 442; Wernz-Vidal, *op. cit.*, IV, pars II, n. 715, p. 145; Coronata, *op. cit.*, n. 955, p. 320; Jombart, *DDC*, III, col. 161; Ayrinhac, *op. cit.*, n. 233, p. 281; Rev. A. Vermeersch, S.J.–Rev. J. Creusen, S.J., *Epitome Juris Canonici*, II (Mechliniae, 1922), n. 728, p. 396; "at least probably," Rev. John A. Abbo–Rev. Jerome D. Hannan, *The Sacred Canons*, II (St. Louis, 1952), p. 620; Blat maintains that one would have to write at least in the mode of a correspondent or collaborator before needing permission; then he adds, "Etsi ratione verborum etiam semel videretur sufficere," *op. cit.*, III, pars II, n. 274, p. 336.

For this measure of leniency there is a sustaining tradition. Previous general law, article 42 of *Officiorum ac munerum,* had enjoined only the *editing* of papers and periodicals; nothing was said about contributing articles.[26] Recourse to previous particular law and the Code sources finds the same leniency. Among the sources listed in the Code for this canon is the *Sacrorum antistitum* of Pius X.[27] Its wording indicates, as Augustine notes, a similar benign tenor.[28] Wernz-Vidal, who feel that the Code clause is taken, at least in part, from the 1850 Council of Lyons, maintain that the Council stressed the same viewpoint.[29]

Thus the opinion is found among commentators who discuss the meaning of " to contribute " in canon 1386 § 1 that a cleric or religious would not need permission for an isolated article or for a number of brief pieces separated over a sufficient length of time.[30] This is independent of whether they are submitted to a religious or secular publication. While Coronata writes that for things of minor moment permission is easily presumed,[31] the emphasis in all of the commentaries is on the minor nature of the writing.[32] Even in the case of minor pieces, to publish repeatedly would certainly raise the question of permission; " notable or frequent " is a suggested

[26] " Iidem prohibentur quominus, absque praevia ordinariorum venia, diaria vel folia periodica moderanda suscipiant." Italics added in text.

[27] Motu proprio *Sacrorum antistitum,* 1 Sept. 1910, IV, *AAS,* II, 655-680; *Fontes,* n. 689.

[28] Augustine, *op. cit.,* VI, p. 442; Coronata, *op. cit.,* II, fn. p. 320.

[29] *Acta et Decreta Sacrorum Conciliorum Recentiorum,* IV (Freiburg, 1892), col. 487—cited hereafter as *Collect. Lac.;* Wernz-Vidal, *op. cit.,* IV, II, fn., p. 144.

[30] Jombart, *DDC,* III, col. 167; Gagnon, *op. cit.,* n. 259, p. 132; Ayrinhac, *op. cit.,* n. 233, p. 281.

[31] Coronata, *op. cit.,* II, n. 953, p. 316.

[32] Vermeersch-Creusen, *Epit.,* II, n. 728, p. 396; Coronata, *op. cit.,* II, n. 955, p. 320.

norm.[33] Augustine cautions that even one article, were it elaborately wrought and dealing with an important subject, ought to request permission.[34] It is pertinent to remark here that in the censorship law of a previous canon, 1385, § 1, there is laid down the precept that for any writing whatsoever which might contain "anything of special concern to religion or morality" there must be previous censorship before the material may be published. This acts as a serviceable supplementary safeguard, to block any abuse of this margin of unasked permission.[35]

These principles provide a workable norm, too, for writing the occasional brief notice type of book review, which consequently would not seem to require permission. However, the review amounting to a lengthy, important article should be so judged, despite the spurious book review format. Likewise, if one's reviewing amounted to serving as editor in charge of a whole section of a periodical, that would be collaboration. So would any position on a magazine or paper that could be correctly characterized as something of an assistant editorship. The listing by the magazine of associate editors and regular contributors would indicate that the clerics thus named were bound by the canon. A priest-columnist who is allotted definite space in each edition of a local paper, say five hundred words under the heading "The Priest's Point of View," should first obtain his bishop's consent. Writing an occasional brief letter to the editor of a journal or newspaper would not appear

[33] Canon Edward J. Mahoney, *Clergy Review*, XIX (1940), 353. While, in truth, moral theology cautions that matter can coalesce, none the less, if each contribution is of no consequence—and in the examples of a cleric writing to tell how he heard the first cuckoo or saw a pretty snowdrop, which Canon Mahoney tolerates without permission, they certainly are of no consequence—it is difficult to see the wisdom of demanding that permission be obtained. Embroidering the law with uncontrolled excogitation and endless lucubration may simply drive reasonably obedient writers to throw up their hands, send the piece off, and take their chances. *Lex non curat pro minimis.*

[34] Augustine, *op. cit.*, VI, p. 442.

[35] Vermeersch-Creusen, *Epit.*, II, n. 728, p. 396; Wernz-Vidal, *op. cit.*, IV, pars II, n. 715, p. 145.

to need permission unless the volume of correspondence led readers to believe the writer was a regular contributor, or somehow religion or morality were in a special fashion significantly involved. The latter would automatically invoke the requirement of canon 1385, § 1, cited above, that " anything of special concern to religion or morality " be submitted to previous censorship.

While it is outside the scope of this article to enter into a discussion of the censorship legislation, it is necessary to note here, particularly in relation to letters sent to big-city secular dailies, enjoying very large circulations including overseas readers, that the clause of canon 1385, § 1 is to be measured not only intrinsically but also extrinsically. Therefore, a letter could need previous censorship because of time or place or some other circumstance of particular importance. Hence, even the discussion of a political or social question or a proposed law, at the time hotly and emotionally agitated, vitally affecting the faith, and liable to enmesh the Church in controversy, should be cleared with the Ordinary. As a measure to help us form judgments about situations which might arise, canonists, e.g., Vermeersch and Jombart, offer the example of papal infallibility at the time of the Vatican Council. Certainly it is not meant to muzzle the clergy and religious; forbidding them *sans* permission to discuss in print current social and cultural concerns of interest to all citizens. Such an excess would document the accusations of the Paul Blanchards. It has been already pointed out that clerics are free, on their own recognizance, to send in a letter on such questions or to examine them in an isolated article. What is sought, in the case of controversial material involving Church welfare, is simply a reasonable and praiseworthy organizational discipline; to this no prudent cleric should refuse Amen.

In the matter of contributions to Catholic papers and periodicals, current clerical practice seems to have gone beyond the isolated or infrequent article, allowed without permission by the canon law manuals. A percentage of the clergy, al-

though not attached to any paper or magazine as staff members or regular contributors, publish sufficient material to verify the judgment they do write habitually. Is any defense possible of this departure from the limitations set by the commentaries?

Although the diocesan faculties of these priests may not specifically mention permission to write, they do authorize the hearing of confessions, preaching, etc.; unmistakable evidence of the bishop's confidence in the calibre of his subordinates, some of whom are apparently tempted to insinuate here something of a general, presumed permission to put their thinking and counsel into print. They are also aware that Catholic organs function with episcopal approval; that the editor, not infrequently already named *censor deputatus,* passes a safeguarding approval upon the material submitted.

If this limited writing without permission, apart from censorship, is a bad habit, it may have been inherited. At the time of *Officiorum ac munerum,* the English hierarchy, in questioning the Holy See about its application, recalled " a tacit dispensation " enjoyed in English-speaking countries.[36] In the constitution itself, article 34 had stated that Vicars Apostolic were to obtain approbation for religious books from the Sacred Congregation of the Propaganda; presumably, periodicals did not need Propaganda's permission.[37] Were countries, possessing the ordinary, established hierarchy, but under the jurisdiction of Propaganda, governed by article 34? The generally negative response of canonists was not too sweeping, for Vermeersch held that the bishops of such countries should consider received custom and their particular directives from Propaganda.[38] By European standards the Church in

[36] " Utrum dicta Constitutio vim obligatoriam habeat, etiam pro regionibus Britannici idiomatis, quas frui tacita dispensatione quidam arbitrantur? Resp. Affirmative." S. C. Indic. 23 Maii 1898, Hurley, *op. cit.,* p. 50.

[37] " Vicarii et Missionarii Apostolici Decreta sacrae Congregationis Propagandae Fidei praepositae de libris edendis fideliter servent."

[38] Vermeersch, *De Prohib.,* p. 100.

the United States, under Propaganda until 1908, is still in its youth. The acceleration of its progress has been unparalleled, but none the less, priests alive today remember primitive, pioneer struggles for the faith. In such days, permission for periodical writing must have seemed a rather distant, fine point of the law. If custom has influenced clerical periodical writing here, it should be evaluated by canonists establishing how many non-censorable articles may be submitted to Catholic periodicals before permission is necessary.

Today Catholic papers and periodicals in the United States are numerically a gigantic enterprise; competition and fast-breaking global events make it also a high-pressure one. Stripped of their quality of immediacy, many articles would be valueless. Delays that could be attendant upon permission would be crippling, something recognized even centuries ago when Italian ecclesiastical authorities waived their rights in the publication of trial briefs if delay would cause injury.[39] For the bishop's office to be handing out permission to every cleric slightly exceeding the narrow limits imposed by Code commentators, would mean added labor and correspondence; not a little of it futile, since permission would presumably precede mailing the manuscripts to editors, who have bad rejection habits.

It is indeed in the nature of things that ecclesiastical law has never been as stringent towards papers and periodicals as towards books, e.g., those lacking the *imprimatur* were not proscribed, nor did periodicals and papers occasion certain excommunications. Before the Code, clerics needed the bishop's consent only for *editing* them, and some types were exempted entirely by canonists.[40] When the more demanding requirements of canon 1386, § 1 were promulgated, the

[39] Martinus Bonacina, *De Censuris in Omnia Opera* (Lugduni, 1624), Augustinus Barbosa, *De Officio et Potestate Episcopi* (Lugduni, 1698), cited in Gagnon, *op. cit.*, n. 396, p. 214. Gagnon gives an historical survey of this legislation and includes valuable bibliographical references.

[40] Vermeersch, *De Prohib.*, p. 50; Hurley, *op. cit.*, p. 227, who also cites Pennacchi.

shadows of the fierce intellectual troubles of Modernism and *L'Action Français* still hovered gloomily. It is pleasing to relate the infinitely healthier clerical intellectual climate of today, and perhaps—focusing the above discussion—not without pertinence to recall how, in the past, the Church has allowed her permission legislation to soften amidst benign conditions. In the words of one such papal document, *Officiorum ac munerum,* "Cum adjuncta rerum atque hominum sensim mutavisset dies, fecit id Ecclesia prudenter more suo, quod perspecta natura temporum, magis expedire atque utile esse hominum saluti videretur. Plures regularum judicis praescriptiones, quae excidisse opportunitate pristina videbantur, vel decreto ipsa sustulit, vel more usuque alicubi invalescente antiquari benigne simul ac provide sivit." [41]

We have noted earlier that canonists recognize tacit, general, or presumed permissions. Some of them resort to such permissions when obliging the secular cleric, who has obtained censorship from the Ordinary of the place of printing or publication, to get further permission from his own Ordinary. Thus Jombart writes: "In practice, this point will not often present difficulty, since the consent of his bishop may be given to the cleric in advance in a quite general fashion." [42] In the same vein is the comment of Vermeersch: "Unless there is some barrier, the secular cleric may reasonably presume the permission of his proper Ordinary, if the Ordinary of the place of printing approved the book." [43] Cannot these considerations be likewise applied, in some measure, to the situation we are examining?

Commentary on our censorship legislation has been in the direction of mitigation in recent years; the article of Father

[41] *ASS,* XXX, 41; *Fontes,* n. 362, p. 504.

[42] "En practique, ce point ne fera pas souvent de difficulté, puisque le consentement de son évêque a pu etre donné au clerc à l'avance d'une manière tout à fait generale." *DDC,* III, col. 167.

[43] "Ac nisi quid obstet, clericus saecularis licentiam proprii Ordinarii rationabiliter praesumet, si Ordinarius editoris librum approbet, . . . ." *Periodica,* XI, p. (17).

Goodwine, earlier alluded to, is not only an example, but an accurate reflection of the present-day opinion of learned, prudent canonists. Actually at the outset, in their treatment of the whole section of the Code dealing with censorship and permission, the commentators, following their predecessors' estimate of the old law, have always stressed that here we are dealing with restrictive legislation and must accordingly be slow to impose unnecessary obligations, whenever possible giving liberty the benefit in interpreting the law. This, I submit, must be the approach here; in view of the considerations outlined in the above paragraphs, the time seems ripe for a more generous assessment of the "*scribere*" of canon 1386, § 1 and a widening of the unasked permission to allow more than an isolated article, or a few small ones separated over a long period, to clerics who regularly write for Catholic papers and periodicals.

In various dioceses either the *Statutes*, or the *pagella* granting faculties, expressly award clerics and religious permission to write. Sipos notes that some bishops, including his own, have extended to their clerical subordinates a general permission to write in Catholic publications.[44] Canonists often recommend that diocesan *Statutes* follow the approach of the Council of Malines. The Council declared that the permission of the Ordinary would be required (otherwise they enjoyed a general permission) for clerics or religious to: 1) write habitually in a newspaper or periodical, 2) publish rejoinders to calumny or contumely that had been bitterly inflicted, 3) write even one article concerning a religious, social or political question being hotly debated or which was of special importance.[45] Quite understandably there is not unanimity among all dioceses. As Canon Mahoney explains, certain broad, general laws are made particular and definite by individual

[44] Episcopus Quinque Ecclesiensis sub nr. 5363/1918. XVII, Sipos, *op. cit.*, n. 166, p. 752.

[45] *Concilium Mechliniense*, IV, n. 232; Wernz-Vidal, *op. cit.*, IV, pars II, fn., p. 145; De Meester, *op. cit.*, III, pars I, n. 1343, p. 262; Blat, *op. cit.*, III, pars II, n. 274, p. 336.

bishops for their own subjects in accordance with the special context and needs of their own dioceses, e.g., the *Decreta et Praecepta* of Liverpool (1932) and Nottingham (1924), after quoting the canon, give the following direction: "Thus it is clear that before writing to the press on *any* subject a priest must obtain the consent of the Ordinary, or of his delegate, who, in such cases, is the Dean of the district." [46]

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[Part II, the concluding section of this Article, will appear in the July number of the current year.]

[46] Mahoney, *Clergy Review,* XIX, p. 354. In the United States, as well as in European countries, diocesan Constitutions and Church Councils had probed this question of permission years before either the Code or *Officiorum ac munerum.* "Optamus praeterea ut clerici nullum prorsus opus, etiam de religione non tractans, suo nomine edant, quin prius consensum nostrum exquirant." (Conc. Plen. II. 502 seqq.; III, 220; Prov. XIV. VII), Constitutiones, Titulus II (De Fide Catholica) #10, Synodus Quinta (1886), *Synodorum Archidioceseos Neo-Eboracensis Collectio,* p. 64.

# Cases and Studies

## THE RELATION OF THE RELIGIOUS PASTOR TO THE LOCAL ORDINARY *

Although the primary purpose of the religious state is to provide special opportunities for the personal sanctification of the members, it is quite clear from canon 608 that religious, whose Constitutions permit such activity, are expected to be interested in the sanctification of other souls through the parochial ministry. In order to provide for the spiritual necessities of the people, local Ordinaries and pastors are exhorted to freely use the necessary help of religious, and religious superiors are urged to make such help available not only in their own churches and oratories but in other churches of the diocese, in so far as such help is compatible with religious discipline. From canons 456, 1425, 630, 1550 and others, it is clear that the care of souls may be not only something transitory in response to requests for assistance, but that it frequently is something that is habitual and enduring. These canons take for granted that entire parishes are united to or entrusted to religious who then have the same obligations as diocesan priests in the care of souls. However, to treat in detail all the rights and obligations of religious pastors would be too much for a paper of this kind. Hence, it is proposed to treat briefly the norms for the appointment and removal of religious pastors and vicars, to mention the more important functions of the *cura animarum,* and to dwell at some length on the matter of temporalities, which, if rumor is not completely unfounded, have been the matter of misunderstandings and disagreements.

### I. The Appointment of Religious Pastors and Vicars

When canon 630, § 4 gives the norms for the administration of parishes cared for by religious, it mentions that religious may be either a pastor or a vicar. The term "pastor" signifies the rela-

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tionship which the religious has to a parish which has not been united to the religious community "*pleno iure.*" Canon 456 refers to a situation in which the parish has been "*concredita religiosis*" without being united to the religious community. The religious appointed as pastor by the local Ordinary is a "*parochus*" in the meaning of canon 630. On the other hand from an examination of canons 1425, § 2 and 471, it is evident that when a parish has been united "*pleno iure*" to a religious community, the moral person of the religious community receives the title to the parish and is the *pastor habitualis*, whose representative in the actual *cura animarum* is called a vicar. Canons 630 and 631 make it clear that the same rights and duties apply to the religious either as pastor or as vicar. Canons 1425, § 2 and 455 and 456 provide that the actual appointment of the religious vicar or pastor be made by the local Ordinary. Although the religious superior authorized to present an individual religious for the office of vicar or pastor is to be determined by the Constitutions, generally such presentation is the right of the major superior of the religious. Furthermore, while the religious superior has the right to freely present a religious for appointment by the local Ordinary, the presentation confers no rights with regard to the parish until the local Ordinary has appointed him pastor or vicar. The local Ordinary has the right to make the judgement concerning the fitness of the one presented, and to deny appointment if the religious does not beyond reasonable doubt have the qualifications required for the office. On the other hand, if the religious does have the qualifications then the local ordinary should appoint him (cf. canons 149, 459, and 471, § 2). Hence, the ordinary procedure would be as follows: The competent religious superior has the right to appoint to one of his religious houses, individual religious subjects, either as local superior or as subject. He then asks the local Ordinary to appoint a specified religious as pastor or vicar of the parish attached to the religious community. Until the local Ordinary has appointed the individual as pastor or vicar, the latter has none of the rights of pastor or vicar. The same procedure should be followed with regard to assignment of other religious as assistants to the pastor or vicar (cf. can. 476, § 4). One of the serious consequences of the failure to seek institution from the Ordinary would be the invalidity of marriages assisted at by religious assigned to the community but not appointed as pastors or assistants by the

local Ordinary, unless common error could be verified in some particular case.

### II. The Removal of Religious Pastors or Vicars

From canons 454, § 5, 471, § 3 and 477, § 1 it is evident that either the local Ordinary or the competent religious superior has the right to remove the religious who is pastor, vicar or curate. Neither authority has the obligation to obtain the previous consent of the other authority. The law merely requires that the authority who undertakes the action for removal, v.g. the local Ordinary, should inform beforehand the other authority, v.g. the competent religious superior, without having any obligation to make known the reason for the removal of the individual religious. The religious superior then has the right to have recourse to the Holy See with devolutive effect. While the right of the local Ordinary and the religious superior is referred to as "*ad nutum*", it should not be exercised without a just cause which appears at least subjectively reasonable. That phrase "*ad nutum*" also indicates that even though the religious had been appointed to the community for a definite period of time, v.g. three years, the removal could be made before the completion of the period. Should such action be taken, it is the obligation of the religious superior to present another candidate for the office of pastor or vicar to the local Ordinary and in such time that the local Ordinary will be able to fill the vacant parish within the maximum time of six months.

### III. The Cura Animarum

When a religious has been appointed pastor or vicar and so long as he retains that office, his obligations with regard to the spiritual welfare of the parishoners are the same as those of the diocesan pastor. Briefly, the principal duties concern the observance of the laws of residence whether general or particular, administration of the sacraments, care of the sick, catechetical instructions, preaching on Sundays and holydays, proper care and custody of the Blessed Sacrament, the Holy Oils, and the church, the erection of schools where the financial condition of the parish permits, etc., etc. In all such matters relating to the care of souls, he is subject to the jurisdiction, vigilance and visitation of the local Ordinary. He is obligated by the general and particular ecclesiastical legislation, unless

the contrary can be proved (cf. can. 631, §§ 1 and 2). By virtue of canon 619, since religious are subject to the jurisdiction of the local Ordinary with regard to their parochial ministry, they are subject to penalties which the local Ordinary may inflict for any delinquencies committed in the work of the parish, unless the religious are exempt by law or by privilege from the censures imposed by the local Ordinary. The mendicant Orders and those who share their privilege of exemption would not be bound by censures inflicted by the local Ordinary, although they would be bound by vindicative penalties and penal remedies and penances so inflicted.[1] In the event that the local Ordinary should issue decrees which differ from those issued by the religious Superior who also has the right of vigilance over the parochial ministry of his subject, then the decree of the local Ordinary is to prevail. In this event the religious superior would have the right to recourse *in devolutivo*, if agreement could not be reached otherwise, even though such a right is not mentioned specifically in canon 631.[2]

## IV. The Administration of Property in Parishes United to or Entrusted to Religious

There is a great variety of opinions concerning the effect of the union of a parish with a religious community, although there is practically unanimity when the parish is merely entrusted to the religious community without any juridical act of union. Delgado[3] followed very closely by Gonzales[4] holds that in the incorporation or union *pleno iure* of a parish with a religious community, the dominion of the beneficial property is transferred to the religious

[1] Cf. O'Brien, *The Exemption of Religious in Church Law* (Milwaukee, Wis.: Bruce, 1942), p. 49; Coronata (*Institutiones Iuris Canonici* [5 Vols., 3 ed., Taurini-Romae: Marietti, 1947-1948] I, p. 816) holds that the exempt regulars are not to be included under any penal laws of the local Ordinary unless he expressly mentions them.

[2] Cf. Clancy, *The Local Religious Superior*, The Catholic University of America Canon Law Studies, n. 175 (Washington, D. C.: The Catholic University of America Press, 1943), p. 116.

[3] *De Relationibus inter Parochum Religiosum et Eius Superiores Regulares* (Editora Vozes Limitada, Rio de Janeiro, 1943), pp. 31-40.

[4] *De Parocho Religioso Eiusque Superiore Locali*, The Catholic University of America Canon Law Studies, no. 313 (Washington, D. C.: The Catholic University of America Press, 1950), pp. 49-60.

community. Mundy[5] maintains that in such an incorporation there is no transfer of parochial property but merely a transfer of title to the parish and of the right to the fruits of the parish which had yielded to the diocesan beneficiary prior to the union of the parish with the religious monastery. Mundy further states[6] "the union effected *pleno iure* transfers the title of the benefice, but the ownership or dominion of its good is retained by the parish itself. Only the *fructus* of the parish comes under the dominion of the religious." "Petrinus"[7] states that "even in the *unio pleno iure*, the Code concedes to the religious institute, so far as temporalities are concerned, only the income of the parish (*fructus paroeciae*)" and that "therefore neither the church nor the *dos* nor anything else that constitutes the property of the parish passes to the religious house which acquires only the *usus* and *ususfructus* of these things." "Likewise the temporal goods continue to belong to the parish—its *dos* (endowment)—although the religious house receives the income (*fructus*) as it also takes the *iura stolae* (perquisites) as any other parish priest." He further states that "in a *pleno iure* union, the benefice itself becomes religious, so that the religious house is the *parochus habitualis perpetuus* and no restriction may be placed upon it either with regard to the *cura animarum* or with regard to the fruits or emoluments of the benefice." All of these recent authors have quoted pre-Code and post-Code commentators and interpreted the law itself to uphold their opinions. In a paper of this kind it is obviously impossible to examine every opinion in detail. Hence with your kind permission I will try to give a positive presentation which will agree in some points and disagree in others with just about all of the above named authors.

### A. THE NATURE OF BENEFICE

According to canon 1409 an ecclesiastical benefice consists of a sacred office and the right to receive the income attached to the office and derived from the productivity of the dowry or principal

[5] *The Union of Parishes*, The Catholic University of America Canon Law Studies, n. 204 (The Catholic University of America Press: Washington, D. C., 1945), pp. 78-81.

[6] *Op. cit.*, p. 84.

[7] "A Contract Determining the Status of a Religious Parish," *The Jurist*, IX (1949), pp. 73-75.

sum. Canon 1410 states that the dowry is made up either of property owned by the moral person of the benefice, or certain and obligatory offerings of some family or moral person, or certain and voluntary offerings given for the rector of the benefice, or of stole fees within the limits of diocesan taxation or legitimate custom. While it is true that there may be a combination of the above sources, nevertheless, as Mundy correctly notes,[8] the enumeration of canon 1410 must be accepted in a disjunctive sense, unless a competent ecclesiastical superior in the decree of the erection of the benefice has combined various forms of income to substitute for or to supplement the productive property. Generally to be excluded would be other revenues which come to a beneficiary by reason of special services performed, even if those are performed by virtue of the office. These may be part of the dowry if they have been specially designated as such by the Ordinary.[9]

It should be noted that the dowry and the right to the income should be based upon the necessity of the incumbent and his right to a fitting and decent livelihood.

In the event that there is no dowry attached to the parochial office by a competent superior, and I think that this is the case very generally throughout the United States, then the parish is to be considered a benefice provided that the demands of canon 1415, 3° are fulfilled, namely the prudent prevision that the necessities for the maintenance of the pastor and operation of the parish will not be wanting.[10] From the wording of canon 1415, 3° to the effect that prudent prevision of income necessary for the pastor and the parish will not be lacking, no conclusion can be drawn that the income is the dowry of the parish, unless competent ecclesiastical authority has set it aside for such purposes. Rather it should be maintained that by reason of canons 1499 and 1536 such income belongs to the

[8] *Op. cit.*, p. 31.

[9] S.C.C. *Resolutio, Canarien,* 16 July 1927—*AAS*, XX (1927), 389; S.C. Consist. Declaratio, Aug. 1, 1919—*AAS*, XI (1919), 346.

[10] Cf. Letter of the Apostolic Delegate to the Bishops of the United States, Nov. 10, 1922—Bouscaren, *Canon Law Digest*, I, pp. 150-151. Bernier, *De Patrimonio Paroeciali* (Quebec: 1938), pp. 55-56, disagrees with the idea of a benefice without a dowry and maintains that the lack of a fixed endowment and income means that there is only an office without a benefice. He maintains that Cardinal Gasparri had an idea of endowment different from our idea of it.

moral person of the parish, and from that income the pastor would be able to take what is necessary for his livelihood within norms fixed by the Ordinary who erects the parish or by his successors. In the United States the fixed income of the pastor and the assistants is usually determined by diocesan legislation, and is designed to supplement the uncertain income derived from Mass stipends and other uncertain emoluments, so that the pastor and his assistants are assured a decent livelihood.

### B. EFFECTS OF COMMITMENTS OF PARISHES TO RELIGIOUS COMMUNITIES

When the Holy See permits the incorporation of a parish with a religious community, canon 1425 states that it may be done in one of two ways. The first form of incorporation, called *quoad temporalia tantum,* gives to the religious a right to share in the fruits of the parish and the obligation to present to the local Ordinary a diocesan priest who will be appointed to take charge of the spiritual welfare of the parish. This priest is to receive a suitable emolument. The canon stresses that the religious community is to be a "*particeps fructuum*", and, as I understand it, if there is a dowry the community will receive the income of the dowry, less the *portio congrua* which is to furnish a decent livelihood for the priest who has the *cura animarum.* There is no hint in the canon that the dominion of the dowry is transferred to the religious community. If the parish has no dowry, it seems to me that the indult of the Holy See will specify what portion of the general income of the parish is to be given to the religious. In such a case, I think that the *congrua portio* of the diocesan priest who has the care of souls would be the same as that allowed to other pastors of the same diocese, unless the Ordinary has fixed some other amount. However, from the very nature of the union, it is rather unlikely that clerical religious will have many such incorporations.

The second form of incorporation is that called *pleno iure* whereby the parish becomes religious as canon 1425, § 2 declares, in such a way that the moral person of the community is the *pastor habitualis,* whose superior is to present a member of the community to the local Ordinary for appointment as vicar with the care of souls (cf. can. 471). Nothing is expressed in this paragraph of the canon concerning an assignment of temporalities. However, since

I would agree with Father Mundy that such a union *pleno iure* transfers the title to the parish to the religious community,[11] then, if there is a beneficial endowment, the right to the revenues of the endowment would be transferred to the religious community, which would have the same rights as a diocesan beneficiary. I do not think that all the income of the parish property would yield to the religious as Father Mundy indicates [12] together with " Petrinus ",[13] but rather that the income of the dowry as such, where it exists, distinct from the other income of the property of the parish, would yield to the religious. I think that there should be kept in mind the distinction between the *fructus beneficii* which is the revenue from the dowry or the suitable portion agreed upon in places where there is no dowry, and the *fructus paroeciae* which has been called the income of the parish. Failure to make such a distinction is the source of many of the difficulties that have arisen in the interpretation of canon 1425, § 2.

In the *pleno iure* union there is no transfer of the dominion of the dowry itself to the religious community, as Delgado [14] and Gonzales maintain.[15] If, as those authors maintain, there is an absolute right of ownership of the beneficial property, then such a right would enable the religious to dispose of the dowry and frustrate its very purpose, which indeed could be very harmful if the parish should be separated from the religious community at some later time. I do not doubt that the religious community would have a right to administer the dowry property and to acquire full dominion over the income, but that is something less than full dominion of the dowry. If the parish had no fixed endowment and no revenues for the pastor or the community, then in the event of an incorporation of the parish with the community, there would be no transfer of property from the parish to the religious. The religious would receive from the income of the parish whatever was granted by the Holy See, and generally after an agreement had been reached between the local Ordinary and the religious superior.

[11] *Op. cit.*, pp. 84-85.

[12] *Op. cit.*, pp. 78, 79, 80, 84.

[13] *Op. cit.*, p. 76.

[14] *Op. cit.*, pp. 32-39.

[15] *Op. cit.*, pp. 49 sq.

A third type of relationship between a religious community and a parish is that which results from an agreement whereby the parish is entrusted temporarily or for a definite period of time to the religious, v.g. a five or ten year contract, as opposed to the perpetuity which is a characteristic of a union granted by the Holy See. In such a temporary committment, the religious community does not receive the title to the parish which remains secular, and the priest placed in charge of the care of souls is designated as a pastor rather than a vicar. This type of relationship can have its foundation by an act of the Apostolic Delegate who has the faculty to permit local Ordinaries to entrust temporarily a parish to a religious group because of the insufficiency of diocesan priests.[16] In such a case the religious community acquires no right to the revenues of the beneficial dowry, if such exists, other than a *congrua portio* for the pastor and whatever assistants may be required to care for the parish.[17]

It is well to mention here that the present practise of the Congregation of the Council seems to be to grant parishes to religious communities not "*in perpetuum*" but "*ad nutum Sanctae Sedis*", with the understanding that the agreement between the local Ordinary and the religious Superior which the Holy See approves cannot be broken without the permission of the Holy See.

To conclude this section, it may be stated that apart from the transfer of the revenues of the dowry fund to the religious community in a *pleno iure* union of the parish and the monastery, it seems that all the other property of the parish remains with the moral person of the parish whenever such a union is established.

While many of the recent authors distinguish the various properties of the parochial benefice,[18] from each other, Delgado and Gonzales and Bernier refer to various moral persons such as the benefice, the parish, the church, foundations, etc., as distinct subjects of rights. Frankly, unless there is some decree of the Ordinary giving juridical personality to these various physical properties, it seems to me that not only is there no valid distinction based on moral personality, but also that there is no distinction between

[16] Faculties of the Apostolic Delegate, n. 48—Bouscaren, *Digest*, I, p. 184.

[17] Cf. Mundy, *op. cit.*, p. 74; Delgado, *op. cit.*, pp. 43, sq.

[18] Cf. Delgado, *op. cit.*, pp. 120-130; Gonzales, *op. cit.*, pp. 152 sq; Bernier, *op. cit.*, pp. 61-64.

the parish and the parochial benefice. At times the *fabrica ecclesiae* may be a distinct moral personality, if so constituted by competent authority, or have a separate endowment in virtue of a gift or gifts limited to the maintenance, repair and adornment of the church edifice. However, in the United States, since endowments are rarely found and since most of the income within a parish is the result of collections taken up in the parochial church for the parish, church and other pious works of the parish, it would seem that when the religious community is made the *pastor habitualis* by a *pleno iure* union or when an individual religious becomes the pastor in a temporary committment, all of the income of the parish belongs to the moral person of the parish, unless the religious or others are the special beneficiary of some collections or donations. It is clear from canons 630, § 3 and 1536 that donations may become the property of the religious unless they are given for the parish and with the understanding that there is no doubt concerning the intention of the donor. In a case of doubt, the presumption is that donations given to pastors, and I think to curates, in parishes or churches cared for by religious are given for the parish. However, I am inclined to think that donations made to religious who live at the parish rectory but are not assigned to the parish on salary basis would not yield to the parish but to the religious community.

### C. ADMINISTRATION OF CHURCH EDIFICE

The basic canons which determine administrative rights with regard to parochial property are canons 1182 and 630. Canon 1182 distinguishes between the property of the church edifice and the remainder of the parish property. The first paragraph of canon 1182 declares that unless there is some special title or legitimate custom to the contrary, the administrator of the church is the rector of the church. In the case of a parish entrusted to religious or united to the community, canon 630, § 4 seems to have that special title whereby the religious superior of the community has the right to administer the money for the construction, maintenance, repair and adornment of the church edifice, if that church belongs to the religious community. The phrase used is "*si ecclesia sit communitatis religiosae*". Most of the recent writers [19] hold that a church

[19] Cf. Bernier, *op. cit.*, pp. 66-67; Delgado, *op. cit.*, pp. 101-103; Gonzales, *op. cit.*, p. 157; "Petrinus," *op. cit.*, p. 77; Mundy, *op. cit.*, p. 87.

is that of a religious community only if the community has the ownership of the church, and hence they would not apply the provision of canon 630, § 4 for the separate administration of the church to anyone but the local Ordinary. Other authors have maintained that if the church has been granted for the perpetual or quasi-perpetual use of the religious community, the immediate administrative rights belong to the religious superior because the church is considered to be religious in a broader but true sense of the term.[20] With all due respect to the holders of the stricter opinion, I think that the opinion which maintains that a religious church is not only a church which is owned but also one which is at least in the perpetual or quasi-perpetual use of the religious community, is soundly probable. This opinion has its foundation in the words of canon 609, § 1 which declares that if the church at which a religious community resides is at the same time a parochial church, the norms of canon 415 for collegiate and cathedral churches which are also parochial are to be applied to the church at which the religious community resides. In such cases the pastor administers the property for the church edifice. One wonders why the insistence upon ownership in the case of religious and not in the case of a chapter which usually does not own the church. Furthermore, canon 609 does not demand ownership but rather habitual residence, which generally is verified in the case of *pleno iure* union or in a committment of the parish *ad beneplacitum Sanctae Sedis*. Moreover, the canon does not seem to require that the church be one which the community owned prior to the union or permanent committment, as would be the logical inference if canon 609, § 1 used the word "*fit*" instead of the present "*sit*". Furthermore, if the parish church existed previously to the union or committment of the parish to the community, then it would be rather unnecessary expense for the religious to erect a church for the liturgical functions prescribed by their Constitutions and to which the Code gives them a right once they have a canonical foundation (cf. can. 497, § 2). Hence, if a parish is united to or entrusted to a religious com-

[20] Cf. Maroto, "Annotationes," *Commentarium pro Religiosis*, VII (1926), 438; Vermeersch-Creusen, *Epitome Iuris Canonici* (3 ed. Mechliniae et Romae: Dessain, 1927-1928), II, 291; Vromant, *De Bonis Ecclesiae Temporalibus* (Lovanii: Museum Lessianum, 1934), p. 216; Nebreda, "De Loci Ordinariorum iuribus circa pia legata donationesve tum Religiosis tum eorum ecclesiis etiam paroecialibus facta," *CpR*, VII (1926), 330,116.

munity indefinitely, and no contrary provision is made concerning use of the parochial church, it seems to me that the church is one which verifies the words of canon 609, § 1, "*Si ecclesia, apud quam residet communitas religiosa, sit simul paroecialis*", and to its administration should be applied the norms of canon 415. "Petrinus",[21] insists that the genitive of possession is used in canon 630, § 4 concerning administration and in canon 1550 concerning pious foundations. He alleges that genitive of possession necessarily means ownership. I am inclined to think that it means possession without the necessity of ownership. Furthermore, if one would be consistent in such an interpretation of the genitive of possession, how would he explain the fact that in canon 1536, § 1 which reads "*Nisi contrarium probetur, praesumendum ea quae donantur rectoribus ecclesiarum, etiam religiosorum, esse ecclesiae donata*", the use of the genitive of possession implies mere possession and not ownership. For if the church is owned by the religious, the donations, although belonging to the church, would in reality belong to the religious community which owns the church. There would be no need of the addition of the words "*etiam religiosorum*". I would also stress that the opinion defended here refers to immediate administration and not to an exclusion of vigilance by the local Ordinary, who could hardly be denied such a right when ownership of the church vests in the parish which also supports the church. I realize that there may be some difficulty concerning the rights of the local Ordinary over pious foundations in this type of church habitually used but not owned by the religious. However, it sems to me that there is a fair amount of extrinsic and intrinsic reasons for the opinion that pious foundations in such a church are under the supervision of the religious Ordinary. Nebreda[22] quotes Vermeersch-Creusen, Blat and Cocchi in defense of his opinion that foundations in churches of exempt religious, habitually used but not owned by the religious, are subject to the exclusive supervision of the religious Ordinary of the exempt religious. Canon 1551 refers to foundations *in* churches of exempt religious and not to foundations for such churches. Since the religious community which has the perpetual or quasi-perpetual care of the parish and the church is the moral person obligated to the fulfillment of the burdens, it would seem

[21] *Op. cit.*, p. 77.

[22] *Op. cit.*, p. 331.

that the religious Ordinary should have the right to determine the norms governing the acceptance, fulfillment and investment of the foundation. In the event that the money would be given to the person of the community, there would be no doubt about this. In the event, that the principal sum is given to the moral person of the parish or to the church edifice, at most it would seem that there would be cumulative vigilance of both Ordinaries, with the local Ordinary primarily concerned with the information concerning the title to the principal sum, and the religious Ordinary concerned with the norms under which the foundation would be accepted, fulfilled and invested. This opinion is in harmony with the opinion that the church of a religious community is one in which the religious have the right to perform sacred functions perpetually or at least indefinitely. This opinion seems to be taken for granted by statute n. 211 of the Statutes of the Archdiocese of New York (1950) which reads: "Pious foundations cannot be accepted by any parish without the consent of the Ordinary. In the case of exempt religious, this consent must be obtained from the proper major Superior" (c. 1546).

### D. ADMINISTRATION OF PAROCHIAL PROPERTY OTHER THAN THE CHURCH EDIFICE

Apart from the special exceptions mentioned previously and based on an examination of canons 630, § 4 and 415 in conjunction with canon 609, § 1 with regard to the church edifice, it is clear from canon 1182, §§ 2 and 3 that parochial property is to be administered by the pastor of the parish. The same is true of parishes which are united with or habitually entrusted to the care of religious communities or cathedral and collegiate churches. The pastor has the same right with regard to the administration of the dowry established for the support of the pastor (cf. can. 1476, § 1), in those parishes in which there is a fixed endowment. In short it can be said that the pastor or vicar of a religious community is the administrator of all ecclesiastical property within his parish, unless there is evidence that some of the property has its own legitimately designated separate administrator. This will be the case when there is a non-collegiate institute such as a hospital, orphanage or home for the aged (c. 1489), or a religious community (c. 532), a seminary (c. 1358), an independent non-parochial church (c. 485), or an

association of the faithful (c. 691, §§ 1 and 5). The religious pastor as is clear from canons 630, § 4 and 631 exercises these rights under the cumulative supervision of the religious superior and the local Ordinary.

Should money be given to a religious pastor as a pious trust, he as the trustee has the right to administer it under the supervision of the Ordinary. If the money has been given for the benefit of the churches or pious causes of the diocese or place, the local Ordinary has the supervisory rights. However, if the money was left for pious causes which are part of the work of the religious community, or has been left to the religious community for unspecified charitable purposes, then the major superior of the religious community is to supervise the administration of the trust.[23]

## V. The Vigilance of the Local Ordinary with Regard to Temporal Administration of Parishes United to or Entrusted to Religious

Canon 1182, § 3 states that the pastor has an obligation whether he be a religious or a diocesan priest to administer parochial property according to the norms of the sacred canons and to render an accounting of his administration to the local Ordinary according to the norm of canon 1525 which calls for an annual report. Furthermore, canon 631, § 1 states that the religious who is pastor or vicar is subject in his administration of parochial property to the jurisdiction, visitation and correction of the local Ordinary. The Pontifical Commission in 1926 applied this ruling even to a parish united *pleno iure* to a religious community.[24] Mundy, without sufficient reason it seems, makes an exception in favor of parishes of religious who own the parochial church. "Local Ordinaries have not the right of vigilance over goods given to a parish united with a religious house, if the parish church itself is the property of the religious."[25] Such an interpretation seems to go far beyond the decision of the Pontifical Commission and the canons concerning the vigilance of the local Ordinary with regard to parochial property.

[23] Cf. c. 1516, § 3. McManus (*The Administration of Temporal Goods in Religious Institutes*, The Catholic University of America Canon Law Studies, n. 109 [Washington, D. C.: The Catholic University of America, 1937]), likens the latter case to a pious foundation, p. 104, sq.

[24] *AAS*, XVIII (1926), 393.

[25] *Op. cit.*, p. 86.

The interpretation given by the Pontifical Commission in 1926 was given in such a way that it upheld the norms stated in canons 630, § 4 and 1550 with regard to the administration of religious churches which are parochial, and with regard to pious foundations in such churches. Although the law clearly vindicates the supervisory power of the local Ordinary over the administration of all parochial property, with the exceptions mentioned for religious churches and for pious foundations in churches of exempt clerical religious, it is evident from canon 631, § 2 that this supervisory power is not exclusive in the case of parishes administered by a religious pastor or vicar. In such parishes the religious pastor or vicar is also subject to the supervision of his religious superior who can also issue decrees concerning the administration of his subject. This is due not only to the vow of poverty, but also to the fact that such unsupervised administration could lead to serious, long-range difficulties for the religious community to which the parish has been united or perpetually or quasi-perpetually entrusted. However, should there be a conflict between the decrees of the two Ordinaries with regard to the administration of the parochial property, the decree of the local Ordinary is to prevail.

Previously [26] we had referred to the right of the local Ordinary concerning the supervision of the administration of a church habitually entrusted to the care of religious but not owned by the community. While there are plenty of opinions to the effect that such churches are not under the supervision of the local Ordinary, and other opinions saying that he has immediate administrative rights, it does seem that the opinion advanced by Mayer is the most reasonable.[27] Although Mayer accepts the opinion that a religious church is one which is either in the dominion or in the perpetual or quasi-perpetual use of a religious community, he thinks that only the ownership and not the mere use of the church entitles the religious superior to exemption from the supervision of the local Ordinary. Even in this case Mayer maintains that if the parish which uses the church must contribute to the support of the edifice from the endowment of the parish, the pastor administers that endowment and has the obligation to give to the religious superior a determined amount for the upkeep of the church. This determined

[26] Cfr., p. 197.

[27] " Die nicht inkorporierte Klosterpfarrei "—*AKKR*, CXII (1932), p. 479.

share of the income would be based upon an agreement between the religious superiors and the local Ordinary, since the latter would have the right to supervise a parochial endowment. If there is no permanent church fund and the church subsists on the alms of the people, even if these offer only a partial support for the edifice, then the religious superior has the right to collect, retain and administer the alms given for the erection, conservation, repair or adornment of the church.

However, when as it frequently happens, the collection is taken up and used for both the parish and the church, then the religious superior and the local Ordinary should have some previous agreement by which there is a clear understanding about the percentage of the collection which is to be used for each purpose. In this way, grievances can be forestalled. This opinion would disagree, and it seems rightly so, with that held by Delgado [28] and Gonzales [29] who maintain that canon 1536 should be applied even to parochial churches, so that in a case where the religious community owned the church, the income of various collections, donations, etc., would belong to the community, unless there was some other specific purpose assigned to guide the will of the donor, or the donor had expressed some specific purpose for his donation.

In the cases where the church is a religious church in the sense that it is not owned by the religious house or institute, but has been given to it with the right of perpetual or quasi-perpetual use, the permission of the local Ordinary is required before the administrator of the church may undertake any extraordinary repairs or rebuilding. This permission does not take from the religious superior the right to administer the work of repair or rebuilding. However, the right of the local Ordinary to supervise the administration of the money which belongs to such a parochial church cannot be denied.

Finally with regard to the supervisory power of the local Ordinary over the property of any parish or church subject to his vigilance, it should be noted that all alienations either in the strict or broad sense of alienation must have the previous consent of the local Ordinary. The same is true of any investments of money given to the religious for divine worship or charitable work in the

[28] *Op. cit.*, p. 128.

[29] *Op. cit.*, p. 156.

place itself, or those given to the parish or mission.[30] Also from a reading of canons 535, § 3, 2°, and 631, § 2, and 1525, the local Ordinary has the right to an accounting of the administration of such property, at least annually and even more frequently if he exercises his right of visitation. Such rights would have little value unless he had the rights mentioned in canon 631, § 2 to issue decrees and inflict penalties for delicts in the administration. As was mentioned previously these powers are not exclusive but rather to be taken cumulatively with the same powers of the religious superior, with the latter yielding in the case of a conflict and at most having the right of devolutive recourse to the Holy See.

In the course of this paper an attempt has been made to follow the directions of the canons and interpretations which appear to be sound and in accordance with the law. It has been said that there seems to be basis for calling a church a religious church when it is given to the habitual or perpetual use of the religious. However, it is only fair to state that the current practise of the Sacred Congregation of the Council is to consider a religious church only one which is owned by the religious, and furthermore to grant parishes to religious only as committments (*concredita religiosis*) *ad nutum Sanctae Sedis,* without any reference to a *pleno iure* union such as is mentioned in canon 1425, § 2. The sample copy of an agreement between the local Ordinary and the religious community seems to be a practical solution to difficulties which have arisen from conflicting interpretations of the "*unio pleno iure*" and the "*ecclesia religiosorum*" and like expressions. Whether the practise of the Sacred Congregation of the Council will be permanent remains to be seen. If it does, perhaps there will be a change in the laws on property so that the wording will be in conformity with the practise, which practise, I have heard, does not have the wholehearted concurrence of the Sacred Congregation for Religious.

The following is a sample of the agreement approved by the Sacred Congregation of the Council, and, as is clear, from the article by "Petrinus"[31] even though the petition may be for a union according to canon 1425, § 2, with modifications expressly mentioned, the Sacred Congregation of the Council merely grants the parish as one "*concredita religiosis ad nutum Sanctae Sedis*".

[30] Cf. canons 1530-1532, 1533; 533, § 1, 3° and 4°.

[31] *Op. cit.*, pp. 81-86.

## VI. Conventio Inter

Rev. mum D. .....
Die et Apostolicae Sedis Gratia Episcopum
pro sua Diocesi

Et Pl. R.P.
Superiorem Provinciae ..... Congreg. N.
pro sua provincia
de unione Paroeciae ..... in .....
Congregationis N.

Praemisso voto Capituli cathedralis, nec non interesse habentium (e.g. parochorum vicinorum, rectorum ecclesiarum, patroni, etc.) ordinatur sequens conventio:

1) Limites paroeciae praedictae sunt:
   a) ad partem occidentalem;
      ad partem meridianam;
      ad partem orientalem;
      ad partem septentrionalem;

2) Declarentur relationes juridicae inter paroeciam et cetera entia (ecclesiae sui juris, vicariae filiales, alia opera pia, etc.) quae in paroeciae finibus exstent.

3) Describantur bona immobilia et mobilia quae sunt in proprietate paroeciae vel ecclesiae, vel beneficii vel entis; eorumque fiat accuratum inventarium, cujus unum exemplar teneatur in curia dioecesana, alterum tradatur familiae religiosae, tertium in paroeciae vel entis archivo servetur.

4) Administratio bonorum paroeciae, ecclesiae, beneficii nec non ceterorum entium dioecesis distincta sit ab administratione bonorum Religiosorum.

5) Paroecia et cetera entia regantur atque administrentur, etiam quoad fidelium oblationes, sicut ceterae paroeciae et cetera entia saecularia dioecesis, salvo regimine proprio ecclesiae quae sit proprietas Religiosorum. (Cf. can. 533, § 1, 3°, 4°; § 2; 535, § 3, 2°; 630, §§ 3, 4; 631; 1525 et Pont. Commissio 25 Julii 1926.)

6) Nihil innovetur quoad ecclesiam et bona paroeciae vel beneficii vel ceterorum entium dioecesis, nisi de consensu scripto Episcopi; innovationes autem, quantum possibile sit, fiant oblationibus

fidelium quae semper censentur factae intuitu paroeciae vel entis donec aliud constet. (Cfr. can. 1536, § 1.)

7) Numerus Religiosorum, qui paroeciae vel ceteris entibus assignantur, ab Episcopo definiatur, audito Superiore Majore.

8) Si quacumque ex causa Religiosi paroeciam derelinquant, donationes, utpote quae paroeciae vel ceteris entibus factae praesumuntur, iisdem cedunt (cfr. can. 1536, § 1), haud exclusa beneficii dote, licet ad eam efformandam Religiosi concurrerint.

9) De cetero paroecia, ecclesia, beneficium et reliqua entia dioecesana Religiosis concredita intelliguntur ad normam iuris et ad nutum Sanctae Sedis.

10) Peracta conventio immutari nequit sine consensu Sanctae Sedis seu Congregationis Concilii.

11) Bene consideratis coram Domino conditionibus supra expositis, consentientibus Consultoribus (Capitulo cathedr.) tum ex parte dioecesis, tum ex parte Provinciae Patrum Congr. N., contractui huic subscribimus eumque firmiter a Nobis et a Successoribus Nostris servandum profitemur.

# Decrees and Decisions

## CANONICAL

### PROHIBITIONS OF BOOKS

The Holy Office placed on the list of forbidden books, on Jan. 29, 1955, the work of Joseph Thomé, entitled *Der Muendige Christ*, Katholische Kirche auf dem Wege der Reifung, published in 1949, by Joseph Knecht at Frankfurt am Main.

It likewise condemned and forbade the publication *La Quinzaine*, on the same day.

On Feb. 14, 1955, the Holy Office announced the submission by the author, Marc Oraison, to the decree of Mar. 18, 1953 in which was condemned the book *Vie Chrétienne et problèmes dela sexualité*.

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### RELIGIOUS AS CHAPLAINS

The Sacred Congregation for Religious, on Feb. 2, 1955, gave an instruction for religious who are serving as military chaplains. The instruction covers their appointment, removal, and supervision. The rules on appointment and removal are the same as those for appointment and removal of religious who act as pastors. Supervision is entrusted to the Military Vicar and their religious superiors.

In time of peace, a religious, to become a military chaplain, must be thirty-five years old, or, in case of real necessity, at least thirty, and such as to give indication of a more mature mind. He must, also, be outstanding in learning, piety, and religious spirit, and must not embrace this state through a love for false liberty.

Religious who are military chaplains can be removed from their positions *ad nutum* by the Military Vicar and the religious superior, provided there are just reasons. The religious superior is to notify the Military Vicar in time so that no difficulty with the military authorities will arise from the removal and that the apostolic labor will suffer no harm. The term of service for a

religious who is a military chaplain is to be for only five years, and the superior's consent is to be renewed every second year. They are not to undertake again the duties of chaplain without having spent at least some months in a religious house where they have willingly submitted to perfect religious discipline. The religious Superior can dispense from this obligation those, particularly, who during their service have not been entirely deprived of the benefits of the religious community life.

Religious who are military chaplains are not to be considered as exclaustrated, but rather as those legitimately absent for reasons of the sacred ministry. They have, therefore, the rights and privileges of their own community and can keep or undertake the functions of their community which do not conflict *de iure* or *de facto* with the functions of a military chaplain. The religious is bound by his vows and duties and does not cease to be bound by the rules, constitutions and prescriptions of the life which he has professed, insofar as these are in keeping with his state and duties.

As to his priestly regulations, the religious is bound by the *Instructio pro Vicariis Castrensibus* issued by the Sacred Consistorial Congregation, April 23, 1915. The religious superiors are bound to give to their subjects who become chaplains "letters of obedience" in which are defined the points here laid down regarding religious discipline, in view of particular conditions and places, and, if it seems opportune, they are to add thereto. Each religious who becomes a military chaplain is to be assigned to some house of his community, the superior of which will look after the religious in spiritual and material matters. If the number of religious who are chaplains seems to require it the major superior can establish an Office for a province or a region or a nation, the function of which will be to take care of the chaplains in matters spiritual, intellectual and material and aid the local moderators. The Congregation desires, further, that a religious chaplain be attached to the office of the Military Vicar to advise him and to aid religious who are chaplains.

It is recommended to Superiors and Military Vicars that religious who are military chaplains be assigned to places where there is a house of their community. If possible, the chaplains should spend the night at their house, or at least in some other religious, or at

least pious, house. Superiors are to admonish the chaplains with regard to the norms of prudence and the opportune precautions, set forth in their constitutions, rules, or statutes, which lead to protecting chastity, so that the chaplains may diligently put them in practice. Superiors are to ask at opportune times, and frequently, the Military Vicar as to the way in which chaplains subject to them are behaving, and if necessary, are to discuss with him the way to protect the religious chaplain from dangers or to induce him efficaciously to perform his duties zealously.

The religious who is a chaplain should know that he is subject to the power of his Superiors no differently than religious who are in charge of parishes. Consequently, saving the rights of the Military Vicar, his entire religious and sacerdotal life is under their vigilance, inspection and judgment. From them he is to seek and receive dispensations and faculties which have to do with the religious life and which he needs. He can also, in the prudent judgment of his Superiors, observe the Ordo for the Divine Office and for Mass, which is established by the Military Vicar. At times established by his Superiors the religious who is a chaplain will render an account of receipts and expenditures to the superior to whom he is immediately subject, so that the religious poverty of the chaplain will be observed entirely. Money which has been received and which has not been used on necessaries of life and in the duties of chaplain will be turned over to the religious Superior, taking into account any rules laid down by the law of the country or the Military Vicar concerning financial aid to be extended by one chaplain to another.

There should be constant communication by letter between the religious who is a chaplain and his Superiors. Superiors, as often as they can, are to come to visit the chaplains or have others come to visit them. Superiors are also to see to it that members, especially of the house to which the chaplain is attached, and of the houses in the place where he dwells, visit the chaplain, invite him to visit them and never cease to follow him with fraternal charity. That same duty of charity they are gladly to perform toward other religious who are military chaplains and who are far away from any house of their community.

Religious who are chaplains should strive first of all to excel other military chaplains in fraternal love and in ardor of sacerdotal

zeal, so that they may show in themselves the living image of the good soldier Jesus Christ. They are to satisfy faithfully the duty of making a retreat each year, in such wise that they do this in a house of their own community. Once a month, for recollection, they are to go to a religious house, where, removed from the world, they can spend the day in meditation on heavenly things. On leaves which are granted, or which they have requested, chaplains are not to spend them with their relatives or in places which they have chosen of their own free will, but in religious houses or places determined for them by their superiors, obeying the will of the latter.

The provisions as to the religious condition of military chaplains and as to the religious and sacerdotal discipline of the same are to be observed even in time of war.

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## CANON LAW INSTITUTE ESTABLISHED

In April, 1954, the Sacred Congregation for Seminaries and Universities gave official approval to the Institute of Canon Law established in the Faculty of Sacred Theology in the University of Munich.

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## PIUS X SCHOOL AFFILIATED

Likewise in 1954 the Sacred Congregation for Seminaries and Universities made the Pius X School of Sacred Music, of New York, an affiliate of the Pontifical Institute of Sacred Music in Rome.

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## SOLESMES AFFILIATED

The Theological Faculty of the Abbey of Solesmes has been affiliated, for a five year period, to the Faculty of Sacred Theology of the Catholic University of Angers.

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## AFTERNOON MASSES

The Sacred Congregation of the Holy Office notes that not infrequently Masses are being said in the afternoon beyond the limits established in the Apostolic Constitution "*Christus Dominus.*" It, therefore, warns Ordinaries of places not to grant permission to

celebrate Masses in the afternoon merely to add to an external solemnity or for the advantage of private individuals. It likewise takes the occasion to recall to everyone that the Constitution "*Christus Dominus*" forbids an interpretation which amplifies the faculties granted therein.

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## RUBRICS SIMPLIFIED

The Sacred Congregation of Rites has issued recently a general decree simplifying the Rubrics of the Breviary and of the Missal. Making changes in the calendar, the decree suppresses "semi-doubles." This creates changes in the rank of Sundays and of Vigils. The suppression of all Octaves, except those of Christmas, Easter, and Pentecost, produces further changes in the calendar. Changes occur, too, with regard to the feast-days of the Saints and with regard to Commemorations.

The *Pater, Ave,* and *Credo* are omitted at the beginning of the Canonical Hours, so that Matins starts with "*Domine, labia mea aperies,*" Lauds, the Minor Hours, and Vespers with "*Deus, in adiutorium,*" and Compline with "*Iube, domne, benedicere.*"

Ferial prayers are said only at Vespers and Lauds of the office of ferial days (Wednesdays and Fridays) during Advent, Lent, and Passion-tide, and the Wednesdays and Fridays and Saturdays of Ember time, excepting the Octave of Pentecost. All other "*preces*" are omitted, as are the "*Suffragium sanctorum*" and the "*Commemoratio de Cruce.*" The Athanasian Creed is said only on the Feast of the Most Holy Trinity.

Other variations also will appear in the recitation of the Divine Office and in the saying of Mass.

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## SECULAR

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## BIRTH CONTROL NOT CAUSE FOR ANNULMENT

In a case presented to the U. S. District Court for the District of Columbia, which involved likewise "grave doubt" as to the petitioner's fulfilment of residence requirements, the Judge said that a spouse's insistence on the use of a contraceptive device in marital

relations is not grounds for annulment of the marriage. The testimony as to such use was uncorroborated, and the accused spouse denied the allegation. The Judge said, "There is certainly a very large practice of birth control in the District. The use of contraceptives, as such, would not be grounds for annulment."

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## DISBARMENT OF ATTORNEY

A recent decision of the Court of Appeals for the Ninth Circuit holds that an attorney cannot be disbarred summarily from practice in a particular court, except for a contempt committed in open court. The Court of Appeals decided that the court below had denied the attorney due process of law under the Fifth Amendment and that it lacked jurisdiction to enter the disbarment order, saying: "A federal court is without jurisdiction to disbar an attorney for a contempt not committed in or near a hearing then being conducted, where due process is denied him by failing to give him notice that his disbarment is being considered or by failing to give him an opportunity to prepare and present a defense."

In the case in question the attorney had obtained a restraining order for his client in the District Court. Four days later the matter was again before the same court but with a different judge presiding. This judge found that the attorney had committed a fraud on the court by procuring the restraining order and set it aside. He then proceeded to read an order of disbarment which had already been prepared and handed it to the clerk for entry. This was not done in a separate proceeding and the attorney claimed he had no knowledge that the judge intended to do anything other than set aside the restraining order. He was thus unprepared to present a defense.

The Court, of course, has power to disbar an attorney for a contempt in open court.

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## UNITY OF HUSBAND AND WIFE

The Supreme Court of Illinois has held that the common-law fiction of the unity of husband and wife will not operate to prevent conviction of spouses for conspiracy. The husband and wife in the

case were jointly indicted and convicted for violation of the Uniform Narcotic Drug Act. This, they contended, was improper because at common law a husband and wife were considered as one person, wherefore they could not be guilty of conspiracy, a crime requiring the participation of more than one person.

The Court said: "No relevant reason which might have supported the asserted common-law rule exists today . . . a husband and wife who enter into a criminal conspiracy are not immunized from prosecution by surviving radiations from the common-law fiction of unity of husband and wife." It further noted that the old fiction has been broken down by such measures as the granting to married women of the right to own separate property, and the removal of the presumption of coercion of the wife by the husband, and the granting of the right to either spouse to testify against the other.

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## TORT ACTION BY WIFE AGAINST HUSBAND

The Supreme Court of Utah was also faced with a problem created by the common-law fiction of the unity of husband and wife. The wife brought an action for an intentional assault committed upon her by the husband during the interlocutory period of their divorce. The Court conceded that a procedural statute of the State providing that a wife could " sue and be sued in the same manner as if she were unmarried " would not confer a substantive right, but it declared that other statutes, such as the married women's emancipation statutes, when read in conjunction with the procedural one, supported the action.

Any action based upon ordinary physical contacts between husband and wife would be barred by the consent implied in the marital relationship, but such consent might be withdrawn, or might not extend to " intentionally inflicted serious personal injuries." In such cases the husband could be held liable.

One judge, concurring specially, said that a right of action existed during the interlocutory divorce period for an intentional tort. Two other judges dissented, saying that it was for the legislature, not the Court, to give such a right of action.

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## AFTER-BORN CHILD'S PORTION

The New York Supreme Court's Appellate Division, Second Department, has had to resolve a will situation complicated by an after-born child and a widow renouncing her rights under the will. The testator was childless when he made his will leaving half to his wife and half to collateral relatives. When he died there was an after-born child who, under New York law, was entitled to two-thirds of the estate to be created from the shares of the "devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will." Creation of the after-born child's two-thirds share would have reduced the widow's and the relative's share each to one-sixth.

The widow, therefore, renounced her rights under the will and elected to take her statutory third "as in intestacy." Under New York law "the will shall be valid as to the residue remaining after the elective share . . . has been deducted," so the Surrogate treating the afterborn child's two-thirds as a statutory legacy and intending to give the widow one-third, deducted two-fifteenths from the child and one-thirtieth from the relatives and added it to the widow's share. Thus one-third went to the widow, eight-fifteenths to the child and two-fifteenths to the relatives.

The Appellate Division held that the after-born child's share was not subject to reduction. Both the child and the widow were to receive their shares as if the testator had died intestate. One-third, therefore, went to the widow, and two-thirds to the child, and nothing to the relatives.

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## DEFENDANT OF UNSOUND MIND

The United States Supreme Court has held that a conviction cannot stand when the accused had no counsel and was allegedly insane at the time of trial. The defendant, convicted in a Texas court of robbery, had been confined to the psychopathic hospital of the State prison for some months prior to trial. Removed from a strait jacket on March 7, 1941, he was tried March 11. No counsel represented him at the trial, although the crime carried a mandatory life sentence because of two prior felony convictions. When the prisoner tried to commit suicide, shortly after his conviction, he was sent

back to the psychopathic ward. While he was so confined the time for appeal of his conviction expired.

The Texas Courts afterward denied him relief on the ground that the issue of insanity could be raised only on appeal, not collaterally. The Federal District Court denied a writ of habeas corpus and was sustained by the Court of Appeals.

The United States Supreme Court, reversing, said that the petitioner was entitled to a hearing on the issue of insanity at the time of his trial, which had been denied him. " The requirement of the Fourteenth Amendment is for a fair trial. No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court."

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## EVIDENCE ILLEGALLY OBTAINED

The Court of Appeals for the Eighth Circuit adheres to the rule that evidence illegally obtained by state officers operating entirely on their own is admissible in a federal court. Kansas City detectives, quite by accident, found fourteen capsules of heroin hydrochloride in a flashlight belonging to a suspect picked up on a robbery charge. These capsules were allowed in evidence when the defendant was tried in the federal court. If any federal officers had been involved in the search the evidence would not have been allowed.

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## ABSOLUTE LIABILITY AND AIRPLANES

The California District Court of Appeal, First District, has held that " operation of an airplane in the year 1954 is not such a dangerous activity that it can be placed " in the list of extrahazardous activities which impose absolute liability. The plaintiff was nonsuited in her action against the owners of a flying school who had lent an airplane to a flying instructor who in turn allowed it to be used by one of his student pilots. The student, flying solo, ran into difficulties and in attempting a forced landing crashed into plaintiff's house.

No agency relationship could be proved between the owners of the flying school and the flying instructor, so the liability, if any, had to rest on the doctrine of absolute liability. In a lengthy

analysis of the subject the Court concluded that California does not consider the operation of aircraft ultrahazardous and hence does not impose absolute liability on lessors of airplanes.

While the *Restatement,* in 1928, declared aviation " in its present state of development " ultrahazardous, and the proposed Uniform Aeronautics Act (1922) contained a rule of absolute liability as to owners, lessors and operators, the Act was withdrawn as obsolete in 1943. In fact, the California legislature in adopting most of the provisions of the proposed Act in 1947 omitted the section imposing absolute liability, substituting therefor a provision that damages caused by a forced landing should be " as provided by law."

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## ARBITRATION UNDER REPUDIATED CONTRACT

The Connecticut Supreme Court of Errors, contrary to what seems to be the rule in most states, holds that a defendant's repudiation or " total breach " of his contract is no bar to his reliance on the contract's arbitration provisions to obtain a stay of a suit on the contract. The conflict of opinion seems to stem from a change of position by the English Courts. In *Jureidini v. National British and Irish Millers, Inc.,* 1915 A.C. 499, they held that a person who repudiates his contract cannot enforce a subordinate clause of the contract. This has been applied to arbitration provisions by Illinois, Kansas, Massachusetts, North Dakota, and Washington. In *Heyman v. Darwins,* 1942 A.C. 356, the British courts held that the defendant is foreclosed from seeking arbitration only if the dispute involves whether or not any contract was ever executed. If the dispute involves a repudiation or breach, arbitration is still available. New York and the Federal Courts have indicated approval of this doctrine.

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## PRICE MISSTATEMENT NOT ACTIONABLE

The Appellate Division of the New York Supreme Court has held that a mere price misstatement is not enough on which to base a damage suit. There was no allegation showing the manner in which the misstatement accomplished a disparagement of quality. Furthermore, even products with a standard price are sold at prices lower than the standard. Just because the price of a prop in an

obviously fictional movie is stated too low, the quality is not thereby necessarily lessened. The Court, however, refused to say that an action would never lie for disparagement of a product in the absence of an intent to injure.

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## WIRE-TAPPING

A judge of the New York Supreme Court, New York County, has observed that the court should be very cautious in authorizing wire taps. Use of wire tapping he calls " the greatest invasion of privacy possible," which is based on the " amoral doctrine " that the end justifies the means. Hence " the most drastic safeguards cannot be too stringent." He goes on to say that authority for a wire tap is far more dangerous than a search warrant. A wire tap cannot, like a warrant, be confined to specific items or to items of a specific class or description. Wire-tapping cannot even be limited to the person suspected of crime, for, in effect, the line of everyone who calls or is called by the suspect is being tapped. From his experience with wire-tapping the judge does not think it yields worthwhile results.

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## BOXING UNDER ANTI-TRUST LAWS

The United States Supreme Court has held that when it exempted baseball from the Anti-trust Laws it did not exempt other sports. It explains that when the complaint against boxing was filed " no court had ever held that the boxing business is not subject to the antitrust laws." Baseball, on the other hand, had been permitted to develop on the understanding that it was not subject to existing anti-trust legislation. Consequently, it is up to Congress to change the law with respect to either sport.

In another case, involving the legitimate theater, the Supreme Court has held that the theatrical business falls within the scope of the Anti-trust laws.

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THOMAS OWEN MARTIN

# Book Reviews

THE CATHOLIC LAWYER. Published quarterly by The St. Thomas More Institute for Legal Research of St. John's University School of Law, Brooklyn, N. Y. Vol. I, no. I, January, 1955. Pp. 79.

The initial number of *The Catholic Lawyer* contains a statement of an Idea and a Program by the magazine's editor, the Rev. Joseph T. Tinnelly, C.M. This statement is a clear exposition of the difficulties and problems occasionally confronting the Catholic lawyer in the practice of his profession. According to this statement, this new magazine will consider these difficulties and problems, discuss them in articles, in extracts and in replies in the time-honored question box. There is no doubt at all that if the contributors to this magazine can come reasonably close to these goals, an immense advantage will accrue to the legal profession.

The division of presentation found in the first number of the magazine and presumably to be followed in succeeding numbers lists the matter as articles, reprints (extracts), book review, legislation, recent decisions, personalities in the news, news notes and the question box. Two supplementary pages furnish the reader with biographical and professional data.

The first number of the magazine contains several articles of considerable worth. There is a good article on Bingo, Morality and the Criminal Law. Of perhaps more interest to the canonist is the article on the concept of Church in the 1954 Internal Revenue Code. Its authors are the Rev. William F. Cahill and Mr. Joseph D. Garland, both professors of St. John's University. It is hoped that more articles will be written, both singly and jointly, by these competent men.

Under the general heading "Reprints" there are several extracts of books and addresses. Of general interest is the extract from Howell's State Trials concerning the trial of Sir Thomas More.

This reviewer wishes *The Catholic Lawyer* every success and wide circulation. The first issue of this magazine gives fine promise of things to come. Lawyers and legal libraries should enter their subscription immediately to be sure of a complete file.

CASES AND STATUTES ON ADMINISTRATION OF THE CRIMINAL LAW. Edwin R. Keedy and Robert E. Knowlton. The Bobbs-Merrill Co., Inc., Indianapolis, Ind., 1955. Pp. xiv-536.

This useful book of cases and statutes of Professor Keedy now appears under the name of Professor Knowlton. Some older cases have been omitted and some recent cases added.

The division of the earlier edition has been for the most part retained. Readers of this edition have found this arrangement satisfactory. The chronological order within the separate parts is continued. Insertions, however, without disturbing this order are made.

By far the most important addition to the work of Professor Keedy is found in the case of United States v. Stephenson. This case considered the admissibility as evidence of a conversation recorded without the knowledge and consent of the defendant. Recording of a telephone conversation by wire recorder or other devices is illegal without the consent of the party making the call. In a rather lengthy opinion, Judge Pine of the United States District Court, District of Columbia, ruled against such recording as admissible evidence. This is not an isolated opinion but many more decisions and subsequent reviews will be necessary before a definite trend can be seen. There are important questions today of security which must be considered along with rights of privacy. It is to be hoped that legislation will be enacted to safeguard private rights as well as the public welfare.

Of considerable interest is the chapter on executive clemency. The existence of clemency is not really disputed but its effects are interestingly discussed in the opinion of Justice Holmes in the case of Biddle v. Perovich and in the opinion of Judge Lehman in the case of People ex rel. Prisament v. Brophy. The latter opinion involves a discussion of whether executive clemency merely revokes the effect of a conviction or actually cancels even the guilt adjudged in that conviction.

There are provided two tables for the information of the reader. One is a table of cases, the other is a table of statutes. The index is satisfactory.

LA CONSÉCRATION DES VIERGES DANS L'ÉGLISE ROMAINE. René Metz. Étude d'Histoire de la Liturgie. Bibliothèque de l'Institute de Droit Canonique de l'université de Strasbourg, IV. Presses Universitaires de France, Paris, 1954. Pp. 501.

Although in existence for a number of years, the Institute of Canon Law at the University of Strasbourg has published comparatively few of its studies. In this selective procedure only the very best has been published. The high standard of earlier publications has been maintained in the historical study of the rite of the Consecration of Virgins.

In a magazine, such as *The Jurist*, devoted almost entirely to the study of Law it is proper to offer for review this historical study of the Liturgy. The Law of the Liturgy is but briefly mentioned in the Code of Canon Law but its obligatory force is not to be denied. Students who are interested in the general subject of Law should avail themselves of opportunities to learn the history of the many rites in the Church.

The volume under review is principally a chronological study of the rite of the Consecration of Virgins. Early chapters deal with the regulation of women who had made the vow of virginity. The very simple ceremonial of consecration in the early Roman rite is accurately described before the appearance of the Sacramentaries. Later developments in the Sacramentaries are discussed.

The Roman rite was subject to the influence of the French disposition to elaborate. This resulted in a fusion of rites which somewhat obscured the simplicity of the Roman rite. What we have today is largely French in ceremonial with the essential rite of consecration retained. Durandus was largely responsible for the permanence of the French elements elaborating the original simple rite. The author writes in sufficient detail of the adaptation of the Roman rite which culminated in the Pontifical of Durandus.

One chapter worthy of attention is a consideration of the Roman Pontificals from their earliest editions to their most recent publication. Whatever alterations were made in these editions are carefully noted.

The author's work is especially noteworthy in tracing the origin of the rubrics of the rite of the Consecration of Virgins in the

modern Roman Pontifical. This is done with such extreme detail that scarcely a rubric is mentioned without its source being furnished. Naturally many of the rubrics are traced to Durandus. There is possibly no other rite in the Pontifical which has received such detailed consideration. It is to be hoped that other rites will be in time similarly studied.

The bibliography and index are entirely satisfactory.

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TAX PLANNING FOR ESTATES (1955 Revision) by William J. Bowe. The Vanderbilt University Press, Nashville, Tenn., 1955. Pp. 98.

This is a useful book for attorneys and their clients. The author has had considerable experience with lawyers, trust officers and tax accountants and he offers a summary of this experience to all who desire some acceptable method of bequeathing all or some of their property.

Ignorance of the estate and inheritance tax laws is widespread and anyone who plans a division of his property should seek the most competent advice possible. The reading of this book will indicate how complex the tax laws are.

The author considers various ways in which the tax laws operate. The proper and honest use of these laws is not escaped but, as the author says, there is no obligation to pay more than the law demands.

Many fraudulent devices are discussed by the author. He cautions against such means to avoid legitimate taxes. There is no need to enumerate all these devices and they mostly fail when challenged by the government because the actual transfer of property or cash is not real but only apparent.

This book should be read carefully by everyone who contemplates donations either *inter vivos* or *mortis causa*.

A satisfactory index is provided.

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PREFACE TO JURISPRUDENCE: TEXT AND CASES by Orvill C. Snyder. The Bobbs-Merrill Co., Indianapolis, 1954. Pp. xxvi-882.

The proper training of a lawyer must necessarily include a solid comprehension of all subjects related to the real core of jurispru-

dence. It is unthinkable that the years in a law school should be devoted to casuistry based entirely upon systems of law. Such instruction, even if digested, must remain disjointed probably never developing into a reasonable philosophy. Yet, it must be admitted, for one reason or another, that some legal fundamentals will not find a place in the curriculum. To meet a need and to supply a text, Professor Snyder has published his Preface to Jurisprudence. An analysis of the broad field contemplated will persuade a reader of the utility of this book.

The author aptly divides his material into several important parts. These parts which actually furnish a text for instruction and reading are followed by a discussion of cases based upon the preceding text.

The main divisions of this book are entitled Jurisprudence as a Science of Law, State, Sovereignty, Law, Lawmaking, Statutes, Theory of Liability, Adjudication, Rights and Liabilities, Things and Persons. There are many subdivisions of these topics which go into minute detail. Many of these details will be found again in the consideration and discussion of apposite cases. This is an admirable method of learning the basic content of a philosophy of law and, at the same time, of realizing how this philosophy is carried out in the actual decisions of the courts. This book, then, could be used as a composite treatment of the basic concepts of jurisprudence or as a textbook illustrating these concepts or, again, as a study of the underlying, fundamental philosophy of law as illustrated in citable decisions.

Almost every part of this book receives the attention it deserves. Of course, protagonists of systems of law will naturally look for a larger and broader treatment of these systems. The author, however, could hardly be expected to dwell more than necessary on the framework of systems. His purpose is to define as well as possible concepts and their use in decisions. More than this would demand extensive and separate treatises on the bases of individual systems of law. Yet none of the accepted systems is in any way neglected.

The last chapter of this book considers the classifications of laws. This is a brief chapter which limits itself to an outline of definitions.

A table of cases used in this book is provided. This table distinguishes between cases the solution of which is cited and cases actually discussed. The detailed index is satisfactory.

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LEHRBUCH DES KIRCHENRECHTS begründet von Eduard Eichmann neu bearbeitet und herausgegeben von Klaus Mörsdorf. III Band. Siebente Auflage. Verlag Ferdinand Schöningh, Paderborn, 1954. Pp. 504. Preis geb. 20.

This volume completes the seventh edition of this useful commentary. The first two volumes appeared earlier and were reviewed in *The Jurist.*

This volume contains commentary on the law of procedure and on the law of penalties. There is little difference between this volume and the sixth edition published in 1950. Some commentary, of course, has undergone some change and a few additional footnotes have been added but for the most part this work is unaltered. As in earlier editions, the footnotes do not reveal much acquaintance with English and American works in Canon Law. This is a defect for there is a growing list of books in the English language which cannot be ignored.

In reviewing the first and second volumes of this commentary, some criticism was made of the absence of a separate index for each volume. This third volume contains a complete index for all three volumes. The index is constructed in great detail and any one who possesses all three volumes will find the index of superlative worth.

The Eichmann-Mörsdorf commentary can be recommended to those who are competent in the German language. In the United States, unfortunately, its use will be limited except in such schools where German is required or taught. It is a pity that wider use of this commentary at present is impossible.

EDWARD ROELKER

# Chronicle

## GENERAL

Archbishop Rohlman of Dubuque resigned at the beginning of the year and has been named Titular Archbishop of Cotrada. He is succeeded by Coadjutor Archbishop Binz who has been Coadjutor since 1949.

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Despite two serious illnesses the year 1954 was a strenuous one for His Holiness Pius XII. He granted 189 private audiences in addition to many general audiences. Outside of general audiences he received 17,000 pilgrims. General audiences were held twice weekly whenever the Pontiff was physically capable of doing so. Two canonization ceremonies marked the year: the first, that of St. Pius X, and the second, that of five other Saints. In addition he delivered 54 discourses and radio addresses; wrote four encyclicals and 13 important letters.

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Cardinal Spellman returned from his annual Christmas visit of the armed forces in Korea and Japan after a 26,000 mile tour in 28 days of the United Nation bases.

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The institute of the Maryknoll Sisters has been elevated to the rank of a religious community of pontifical approval.

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By decree of the Sacred Congregation of Rites the faculty to transfer the Holy Saturday Liturgy to the early morning hours was extended to Bishops for another year.

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Our Lady of the Railways Chapel was opened in Boston's South Station with Mass by Archbishop Cushing.

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On March 12, the 16th anniversary of the coronation of Pope Pius XII was observed throughout the world.

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The Reverend Michael Igoe, priest of the diocese of Richmond, delivered the prayer with which the United States House of Representatives opened its session on February 28.

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*Players Inc.*, a group of graduate players of The Catholic University of America's School of Drama, was sponsored by the United States Department of Defense for their third foreign tour this summer.

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## DIGNITIES

Cardinal Tedeschini, Papal Legate to the National Marian Congress in Lima, Peru, visited the United States as guest of the Apostolic Delegate.

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Monsignor Benincasa of Buffalo has started his service in the Papal Secretariat of State at the Vatican.

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The Reverend Malcolm Lavelle, C.P., American-born General of the Passionist Fathers, celebrated his Silver Jubilee as a priest on January 4.

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Monsignor Elko has been appointed Apostolic Administrator for the Greek Rite Diocese of Pittsburgh.

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Auxiliary Bishop Eric MacKenzie of Boston delivered the invocation at the 1955 opening of the Massachusetts State Supreme Court.

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Monsignor McDonald, Professor of Philosophy at The Catholic University of America, has been appointed Vice Rector of the University by the Sacred Congregation of Seminaries and Universities.

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The Very Reverend Charles Maloney, Chancellor of the Archdiocese of Louisville, has been named Auxiliary to Archbishop Floersch of Louisville, with the consecration date set for February 2.

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The Right Reverend Monsignor Joseph Durick of Mobile-Birmingham has been named Auxiliary to Archbishop Toolen of Mobile-Birmingham and the consecration has been arranged for March 24.

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The Very Reverend Paul Marcinkus of Chicago, a member of the Papal Secretariat of State, has been named to the staff of the Papal Nuntiature in La Paz, Bolivia.

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Cardinal Masella was named by Pius XII as Papal Legate to the 36th International Eucharistic Congress in Brazil on July 17-24.

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The Very Reverend Sylvester Taggart, C.M., was appointed Provincial of the Eastern Province of the Vincentians.

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The Holy See has granted the monks of St. Procopius' Abbey, Lisle, Illinois, faculties to offer Mass, administer the Sacraments, and recite the Divine Office in both the Latin and Byzantine rites.

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Archbishop O'Boyle of Washington, D. C., celebrated the annual Red Mass at St. Matthew's Cathedral in the presence of eighteen ambassadors and many high-ranking government officials.

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The Reverend Rudolph G. Bandas, rector of St. Paul Seminary in St. Paul, Minnesota, has been named a domestic prelate by Pope Pius XII.

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Monsignor Nicholas Elko, Apostolic Administrator of the Greek Rite Diocese of Pittsburgh, has been named Titular Bishop of Apollonias.

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The Reverend Cormac Walsh, O.F.M., received his third Silver Star for heroism in Korea as Chaplain with the United States' Forces.

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The Reverend Theodore Hesburgh, C.S.C., President of Notre Dame University broke ground for a television station to be operated by the University of Notre Dame.

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The Right Reverend Theodore Ryan of Seattle has been appointed Vicar General by Archbishop Thomas Connolly.

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Bishop Loras T. Lane, Auxiliary to Archbishop Rohlman who has just retired, has been renamed as Auxiliary to Archbishop Binz of Dubuque.

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The Reverend John McGrath of Steubenville, Ohio, a student of Canon Law at The Catholic University of America, has been admitted to practise before the United States Supreme Court.

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ROMAEUS O'BRIEN, O.Carm.